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No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

ILLINOIS COMMERCIAL MEN'S ASSOCIATION,
Appellant,

vs.

BOARD OF EQUALIZATION, STATE OF CALIFORNIA,
Appellee.

On Appeal From the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED FOR REVIEW

Does the California gross premiums tax on insurers (Cal. Const. Art. XIII, Section 14⅘, Revenue and Taxation Code Sections 12201 and 12202) as applied to an Illinois mail order insurer with no offices, property or employees in the State of California violate the due process clause of the Fourteenth Amendment to the United States Constitution?

LIST OF ALL PARTIES TO PROCEEDING

In addition to Illinois Commercial Men's Association v. the State Board of Equalization, the decision below of the California Supreme Court spoke to National Liberty Life Insurance Company v. State Board of Equalization, a similar case concerning the same gross premiums tax on insurers.

DESIGNATION OF CORPORATE RELATIONSHIPS

Illinois Commercial Men's Association, filing this Jurisdictional Statement as appellant in this proceeding, states that:

This is its original Designation of Corporate Relationships.

Illinois Commercial Men's Association, now Interamerica Consolidated Mutual Assurance Company, is not owned by any parent corporation.

Illinois Commercial Men's Association, now Interamerica Consolidated Mutual Assurance Company, does not have an ownership interest in any subsidiary (excepting only wholly-owned subsidiaries).

Illinois Commercial Men's Association, now Interamerica Consolidated Mutual Assurance Company, does not have any affiliate.[1]

[1]During the tax years in question Illinois Commercial Men's Association was organized as an assessment company under the laws of the State of Illinois. Effective September 30, 1982, Illinois Commercial Men's Association was merged into Illinois Travelling Men's Health Association. The name of the merged association was changed to Illinois Commercial Men's Association. Effective November 15, 1982, Illinois Commercial Men's Association was converted to a mutual insurance company, and its name was changed to Interamerica Consolidated Mutual Assurance Company.

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On Appeal From the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Opinion of the Supreme Court of California, reproduced in Appendix A hereafter, was reported at 34 Cal.3d 839, 196 Cal.Rptr. 198.

The Opinion of the Court of Appeal, reproduced in Appendix B hereafter, was reported at 140 Cal.App.3d 516, 189 Cal.Rptr. 610.

JURISDICTION

This is an appeal from a decision of the Supreme Court of California upholding under the due process clause of the Fourteenth Amendment to the United States Constitution the imposition by the State of California of a gross premiums tax (Cal. Const. Art. XIII, Section 14⅓) on insurance premiums received by an Illinois insurer selling

insurance to California residents through the United States mail. The Opinion of the California Supreme Court was entered October 31, 1983. Notice of Appeal to the Supreme Court of the United States was filed with the Supreme Court of California on January 19, 1984.

Jurisdiction of this Court to review the judgment below by appeal is conferred by 28 U.S.C. Sections 1257(2) and 2101(c). If for any reason appeal is improvidently taken, appellant prays that appropriate action be taken to regard and act on this Jurisdictional Statement as a Petition for Writ of Certiorari as provided by 28 U.S.C. Section 2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS

(Verbatim provisions appear in Appendix I herein as authorized by Supreme Court Rule 15.1(f)).

Constitution of the United States: Fourteenth Amendment

Constitution of the State of California: Article XIII, Section 14⅓ (now Section 28).

California Revenue and Taxation Code Sections 12201, 12202, 12978 and 12979.

STATEMENT OF THE CASE

Illinois Commercial Men's Association (ICMA) sells through the United States mail from its offices in Illinois insurance for death, dismemberment and disability due to accidental bodily injury. Through mail solicitations ICMA sold such insurance policies to residents of California until 1968 when it ceased marketing insurance to California residents rather than submit to California's regulation. ICMA marketed its insurance through the mail, maintained no offices, outlets, property, agents or employees in California, and did not sell insurance in California through

agents, drummers, salesmen or independent solicitors. In 1968, the State of California, through its tax agency, the State Board of Equalization (hereafter the Board), imposed the California gross premiums tax (Cal. Const. Art. XIII, Section 14½, Revenue and Taxation Code Sections 12201 and 12202) on the premiums received by ICMA from California residents from 1963 to 1967.

ICMA paid the taxes imposed by California and filed with the Board claims for refund, challenging on Constitutional due process and other grounds California's authority to tax an out-of-state insurance company which marketed insurance to California residents solely through the mail, while maintaining no property, agents or employees in California. The Board denied the claims for refund, and ICMA filed suit in the California Superior Court for refund of taxes and interest erroneously and illegally assessed and collected. ICMA's case was consolidated with the action brought by National Liberty Life Insurance Company, a mail order insurance company bringing a similar suit. From that time, the cases of the two companies have been heard together, but they have been briefed and argued by separate counsel and remain separate cases. The Superior Court held for the Board.

Appeal was taken to the First District Court of Appeal which found for ICMA, holding that the imposition of California's gross premiums tax was in violation of the due process clause of the Fourteenth Amendment to the United States Constitution. The Board's petition for rehearing was denied by the Court of Appeal. On the Board's petition for hearing, the California Supreme Court affirmed

the judgment of the Superior Court, declaring that California met the requisite due process tests for imposing the California gross premiums tax on premiums received by ICMA for insurance sold through the mail from Illinois. The decision of the California Supreme Court was entered October 31, 1983. ICMA filed Notice of Appeal to the Supreme Court of the United States on January 19, 1984.

ICMA has challenged the California gross premiums tax as imposed as a violation of the due process clause of the Fourteenth Amendment of the United States Constitution, raising that issue at the administrative level in its Claim for Refund, before the Superior Court in its complaint, and in its briefs to the Court of Appeal and the California Supreme Court. The Superior Court found that by protecting the health and welfare of its residents, which ICMA was insuring, California provided a benefit to ICMA for which it could ask the return of a gross premiums tax, reasoning that out-of-state insurers such as ICMA were gambling on the well-being of California's residents and that California was entitled to a return for improving the odds in that gamble. The Superior Court also determined that sufficient nexus for such taxation existed because the activity of mail order insurers which had been held sufficient for regulation by the California Supreme Court in *People v. United National Life Insurance Co.* 66 Cal.2d 577, 58 Cal.Rptr. 599, 427 P.2d 199 *appeal dismissed sub nom. United National Life Insurance Co. v. California,* 389 U.S. 330 (1967) could not be significant for regulation yet de minimus with respect to taxation. The Superior Court also held that sale of a number of policies indicated significant benefit to ICMA.

The Court of Appeal reversed the Superior Court, holding that the State could not establish the requisite minimum link or nexus for taxation necessary under the Fourteenth Amendment to the United States Constitution. The Court specifically noted that activities within California of independent contractors who occasionally performed certain investigative functions for ICMA were not sufficiently significant to overcome the holding of *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967) concerning taxation of out-of-state mail order enterprises. The Court also held that the mere presence of insured persons within California did not constitute a benefit to ICMA justifying imposition of the gross premiums tax.

The California Supreme Court affirmed the judgment of the Superior Court, holding that the "definite link" and "minimum connection" required under the Fourteenth Amendment to the United States Constitution in order to tax ICMA was to be found in the activities in California of certain independent contractors who occasionally investigated policyholder claims. The Court found that benefits conferred by the State on those independent contactors became benefits to the out-of-state insurer.

THE QUESTION IS SUBSTANTIAL

I

THE HOLDING OF THE CALIFORNIA SUPREME COURT IS IN CLEAR CONFLICT WITH THIS COURT'S RULING REGARDING STATE TAXATION OF OUT-OF-STATE MAIL ORDER ENTERPRISES.

In sustaining the ruling of the lower court, the California Supreme Court purported to apply clearly enunciated due process tests for the imposition of a tax on an out-of-state business. Yet, the Court extended those tests far beyond the boundaries to which they previously reached in order to find authority to tax an out-of-state mail order insurance company. The question presented in this appeal is substantial because the ruling of the California Supreme Court constitutes an unprecedented extension of the rights of states to tax out-of-state businesses, an erosion of significant due process standards enunciated by this Court, and a misapplication of prior decisions of the United States Supreme Court.

Rejecting numerous contentions by the California State Board of Equalization that the taxation of insurance companies is the subject of due process criteria distinct from those applicable to other enterprises, the California Supreme Court stated that the application of established due process tests demonstrated that certain activities within California by independent contractors on behalf of ICMA sufficed to enable California to tax ICMA. Although basing its holding in part on criteria stated in *National Bellas Hess v. Department of Revenue, supra*, (hereafter *National Bellas Hess*), the California Supreme Court greatly restricted the applicability of *National Bellas Hess* while holding that activities in California by independent

contractors on behalf of an out-of-state enterprise, even though not a part of the enterprise's systematic plan of operation or marketing, constitute contact with California by the enterprise and an identifiable source of benefits to the enterprise sufficient to justify taxation.

ICMA marketed through the United States mail insurance for death, dismemberment and disability due to accidental bodily injury. California residents interested in obtaining such insurance made application to ICMA's office in Illinois. If an offer from a California resident was accepted, a binding insurance contract was formed in Illinois. ICMA neither owned nor leased any property in California, maintained no offices in California nor had physically present in California any agent or representative or any person who solicited business on its behalf in California. Almost all applications for insurance were processed without investigation, but on the average of five or six times a year, ICMA requested reports from independent contractors, such as Retail Credit Company, to confirm the information provided on the application, although it is not known if this was ever done for a California resident during the years in question. Stipulation of Facts, ¶¶ 21, 22, 27, 28.

When a claim was made, ICMA would mail a claim form for completion by the insured and his physician. Although about ninety percent of all claims were processed and paid within twenty-four hours of receipt, for the remaining ten percent ICMA would seek confirmation from Retail Credit Company or Hooper-Holmes Agency. If the information reported by those agencies did not suffice, ICMA would correspond with or telephone the claimant. If still uncertain, ICMA would refer the matter to an independent contractor in California to investigate and settle the matter.

In 1965 thirty-six out of six hundred seventy-one claims were so handled by the independent contractor last mentioned, in 1966 fifty-five out of six hundred forty, in 1967 twenty-five out of five hundred eighty-one, and in 1968 eight claims were so handled. Stipulation of Facts, ¶¶ 31, 32, 33, 34.

The California Supreme Court found authority for California to tax ICMA based on the investigative activities of the independent contractors. To hold that independent businesses, in some instances established credit reporting companies, can confer on the State jurisdiction to tax their out-of-state clients is a clear misapplication of constitutional due process standards.

National Bellas Hess, supra, held that a mail order retailer selling merchandise through catalogue solicitations and flyers could not be subject to taxation by a state in which it had no agents, salesmen, representatives or offices because, under the standards of the due process clause of the Fourteenth Amendment to the United States Constitution, a state cannot tax a seller whose only connection with customers in the State is by common carrier or the United States mail. The California Court found the due process protections enunciated in *National Bellas Hess* unavailable to ICMA because of the investigative activities of independent contractors on behalf of ICMA. In so doing, the California Court apparently chose to overlook the collateral activities Bellas Hess engaged in, along with mail order merchandising, as explained by the dissent in that case. For example, a substantial part of Bellas Hess' sales was on credit and included "Budget Aid Family Insurance"

which was automatically extended to all credit purchasers unless specifically rejected. Bellas Hess also provided charge account services for those filing applications answering questions concerning their background and financial resources. As indicated by the dissent, Bellas Hess' substantial credit business implied the utilization of Illinois credit and banking services. *National Bellas Hess, supra,* 386 U.S. at 761-762. Implicit in such operations was some sort of collection system, even if only by assigning claims to independent parties. The "Budget Aid Family Insurance" implies some sort of insurance claim procedure, and one suspects some of those claims must have been investigated. The United States Supreme Court did not find that such activities by a mail order enterprise established the requisite nexus for taxation. Nonetheless, the California Supreme Court found ICMA's referral of investigations to independent contractors to be so significant as to place ICMA within the authority of California to tax it. Because all insurance companies must at some time pay claims, and because some claims will inevitably prompt further investigation, the California Supreme Court has stated that *National Bellas Hess, supra,* while holding true for retailers, cannot hold true for insurance companies.

National Bellas Hess posited the Fourteenth Amendment due process test for state authority to tax an out-of-state enterprise as some minimum connection between the state and the person to be taxed so that the state has given something for which it can ask return. *National Bellas Hess, supra,* 386 U.S. at 756. The California Court, finding the activities of the aforementioned independent contractors significant, imputed to ICMA the benefits conferred on those contractors by the State.

For an independent contractor to pass benefits through to the one contracting with it, the status of independent contractor must have shifted to that of agent or representative. The California Court found that metamorphosis, even though the State had stipulated that the persons in question were independent contractors, because insurance requires claims investigation and because of the number of investigations (three hundred thirty-one).

The Court clearly stated in *National Bellas Hess* that there exists a "sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, or property within a state, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *Id.*, 386 U.S. at 758. The Court stated that the distinction is valid, and, as applied to Bellas Hess, the Court specifically declined to obliterate the distinction. By comparing the activities of Bellas Hess and ICMA, it appears that the California Supreme Court has decided that the distinction should now be obliterated.

Since this Court's decision in *National Bellas Hess, supra,* this Court has not heard full argument on the matter of the restrictions on state taxation of out-of-state mail order enterprises under the due process clause of the Fourteenth Amendment. This Court recently dismissed the appeal of a case raising that issue in the midst of a host of other issues, although framed in a different factual context from that posed by ICMA. *Armed Forces Cooperative Insuring Assoc. v. Department of Revenue,* 622 P.2d 1318 (Wyo. 1980), *appeal dismissed,* 454 U.S. 1130 (1982). That decision has been relied on by the Board and the Court

below to strip from ICMA the clear protections of *National Bellas Hess, supra.* Similarly *Ministers Life and Casualty Union v. Haase,* 30 Wis.2d 339, 141 N.W. 2d 287 (Wis., 1966), *appeal dismissed,* 385 U.S. 205 (1966), although involving the use of "group leaders" within a state to obtain sales of policies and involving a statute combining regulation and taxation, was relied on as supporting the holding of the California Supreme Court. Both cases involved companies engaged in more than mere mail order solicitation. *Armed Forces Cooperative v. Department of Revenue, supra,* involved the added complications of federal enclaves, regulation of insurers and jurisdiction over the military. *See,* Jurisdictional Statement. Nonetheless, although those cases are distinguishable from that of ICMA, both have been so applied as to severely restrict the holding of *National Bellas Hess.* Thus, full consideration by this Court of the matters raised herein is necessary in order to avoid erosion of *National Bellas Hess* through overly broad applications of cases in which this Court dismissed appeals.

II

THE DECISION OF THE CALIFORNIA SUPREME COURT MISAPPLIES THE CRITERIA FOR ESTABLISHING REQUISITE NEXUS FOR A STATE TO TAX A NON-RESIDENT.

To find that the activities of certain independent contractors placed ICMA outside of the scope of *National Bellas Hess,* the California Court relied on *Scripto v. Carson,* 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed.2d 660 (1960) and *Standard Pressed Steel Co. v. Washington Revenue Dept.,* 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719 (1975). In *Scripto,*

certain wholesalers, jobbers or specialty brokers sold pens on behalf of Scripto, on a commission basis. The State of Florida imposed a use tax on Scripto, a Georgia corporation, for pens sold by the wholesalers in Florida. In upholding imposition of the tax the Court found that the wholesalers were salesmen who, although not "employees" but "independent", were responsible for procuring a substantial flow of goods into Florida. *Scripto v. Carson*, 362 U.S. at 211. The critical factors were the nature and extent of the activities in Florida. *Id.* It was clear that the wholesalers were engaged in the systematic exploitation of the Florida market, actively soliciting sales in Florida and producing a substantial flow of goods into Florida. Their activity constituted a clear plan of operation and was the method through which Scripto chose to enter the Florida market. The use of the term "independent" to characterize those wholesalers could not of itself immunize Scripto from the Florida tax.

In contrast to such direct, in-state, systematic exploitation of a market at the direction of an out-of-state enterprise, ICMA marketed through the mail and attempted to settle its claims through the mail. Its system was a mail operation. Only when doubts were created by an insured's claim did ICMA not pay claims solely by mail and then, lacking its own personnel in California, it asked independent parties to make a report on the claim.

As the Court noted in *Scripto v. Carson, supra*, the mere label "independent" is not conclusive. The facts are determinative. The clear distinction between *Scripto v. Carson* and the present case is that the independent salesmen in

Scripto v. Carson constituted the mechanism for the systematic exploitation of a state's market, a planned system providing the sales which are the lifeblood of a commercial enterprise, whereas ICMA's referral of some claims questions to independent investigators was not a systematic development of sales nor even the principal method for handling claims, most of which were settled through the mail. The Court in *Scripto v. Carson* concluded that the term "independent" disguised an organized sales force. ICMA's activities most closely resemble those described by the dissent in *National Belas Hess, supra*, and do not at all resemble the problems before the Court in *Scripto v. Carson*. *Scripto v. Carson* did hold that the word "independent" is not determinative, but there must be occasions in which the activities of "independent" persons cannot be attributed to their clients, or else *Scripto v. Carson* and *National Bellas Hess* are in conflict.

In *National Bellas Hess*, the Court characterized *Scripto v. Carson* as an extreme case demonstrating "the furthest constitutional reach to date of a State's power to deputize an out-of-state retailer as its collection agent for a use tax." *National Bellas Hess, supra*, 386 U.S. at 757. If the systematic exploitation of a market by independent salespeople is the extreme, then occasional investigative referrals to independent contractors, used only when other methods have not been satisfactory, would appear to fall beyond the reach of *Scripto v. Carson, supra*, and within the protections described in *National Bellas Hess, supra*.

In *Standard Pressed Steel Co. v. Washington Revenue Dept., supra*, Standard Steel had an employee living in the State of Washington who serviced an important client in

that State and whose activities were necessary in order for Standard Steel to sell, to obtain samples, to resolve problems and to retain goodwill and rapport with the client. *Id.*, 419 U.S. at 561. The California Court found those essential marketing activities by a resident employee in *Standard Pressed Steel* to be analogous to occasional investigations for ICMA by independent contractors, required when ICMA's mail order claims procedure left unanswered questions. The critical factor in *Standard Pressed Steel v. Washington Revenue Dept., supra,* however, was that the presence of a full-time employee "made possible the realization and continuance of valuable contractual relations" between Standard and its client. *Id.*, 419 U.S. at 562. Such systematic activity by an employee resident in a state as part of a planned marketing operation is not the same as the referral of occasional doubtful claims to independent businesses which handle investigations.

The distinction between ICMA's activities and those of the taxpayers in *Scripto v. Carson, supra,* and *Standard Pressed Steel Co. v. Washington Revenue Dept., supra,* is that those taxpayers had entered a state through an employee, or essential sales persons who were the means for penetration of the state, as part of a systematic plan of action, whereas ICMA attempted to conduct all of its operation through the mail and only resorted to the assistance of independent businesses when it could not otherwise handle a problem. If one follows the reasoning of the California Court as applied to ICMA, a request that an independent business perform a service in another state may give that state taxing authority over the out-of-state enter-

prise making the request. Obviously, there must be a point at which an independent party is truly independent or due process restrictions on taxation by the states will become meaningless.

III

CLAIMS INVESTIGATION BY INDEPENDENT CONTRACTORS DOES NOT CONSTITUTE NEXUS FOR PURPOSES OF TAXATION.

Although the Court has considered due process issues regarding the taxation of insurance companies by the states, it does not appear that claims adjustment activities have been the factor on which those cases have turned. Thus, in *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451, 82 S.Ct. 1380, 8 L.Ed. 2d 620 (1962) the Court held that Texas could not tax insurance premiums paid outside of Texas to an insurer located outside of Texas even though the subject property of the insurance was in Texas. Presumably, if the property was in Texas, claims might arise in Texas and someone in Texas might investigate the claims. Nonetheless, the premiums were not taxable, and the matter of claims was not mentioned as significant.

In *St. Louis Cotton Compress Company v. State of Arkansas*, 260 U.S. 346, 43 S.Ct. 125, 67 L.Ed. 297 (1922), the Court held that Arkansas could not impose a tax on premiums for insurance covering "large investments in Arkansas in real and personal property" arranged for outside of Arkansas. *Id.*, 260 U.S. at 348. Presumably large investments may give rise to claims meriting investigation. The Court, however, was silent on that issue.

In *Allgeyer v. State of Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832 (1897), the Court held that under the due process clause of the Fourteenth Amendment to the United States Constitution, a resident of Louisiana could not be barred from mailing a letter to New York arranging for insurance covering property in Louisiana. The possibility of a claim concerning that property was not addressed and, presumably, was not relevant.

Even in those instances where the possibility of claims investigation is mentioned, e.g. *Connecticut General Life Insurance Company v. Jackson*, 303 U.S. 77, 58 S.Ct. 436, 82 L.Ed. 673 (1938); *Compania General de Tabacos v. Collector*, 275 U.S. 87, 48 S.Ct. 100, 72 L.Ed 178 (1927), claims were not significant, but rather the cases turned on the criteria of actual physical presence in the state discussed in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1977). *National Geographic Society v. California Board of Equalization* reaffirmed the Court's holding in *National Bellas Hess, supra,* that there is a "sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within [the taxing] state, and those [like Bellas Hess] who do no more than communicate with customers in the state by mail or common carrier as part of a general interstate business. *Id.*, at 758, 18 L.Ed.2d 505, 87 S.Ct. 1389." *National Geographic Society v. State Board of Equalization, supra,* 430 U.S. at 559. Indeed, the California Supreme Court in *National Geographic* applied a "slightest presence" test which this Court rejected, placing emphasis instead on the actual presence and activities of the taxpayer in the state. It would appear that by dwelling on the activities of inde-

pendent contractors acting on behalf of ICMA, the California Court has veered toward a slightest presence test while denying it was so doing.

Further, in light of the apparent lack of significance of claims investigation and adjustment in the above-cited cases, if claims investigation by independent contractors can create the requisite nexus for taxation of a mail order insurer, one must conclude that until a claim is referred for investigation to a third party in a state, the premiums received through the mail from that state are not taxable. Thus, the above-cited holdings were actually to apply only until someone examined the insured property, a conclusion not at all apparent in the cases themselves.

There is further reason why claims investigation is a suspect basis for finding authority to tax. Life and health insurance policies are often written by insurance companies possessing certificates of authority to write insurance in some, but not all, states. Inevitably, because people travel, claims will be made on those policies in states where the insurer possesses no certificate of authority. Such claims conceivably will require investigation. Nonetheless, states do not tax policy premiums based solely on the fact that claims arise within their jurisdiction. *People v. Alliance Life Ins. Co.*, 65 Cal.App.2d 808, 151 P.2d 868 (1944). The criteria for taxing insurance companies must turn on such factors as presence in the state, systematic, planned use of personnel in the state and method of sales, not fortuitous requirements for investigation by independent parties. *National Geographic Society v. California Board of Equalization, supra; National Bellas Hess v. Illinois, supra; Miller Bros. Co. v. Maryland*, 347 U.S. 340, 98 L.Ed.

744, 74 S.Ct. 535 (1954). Taxation is not constitutionally proper where, as here, the plan of operation envisions claims settlement by mail with referrals to outside investigators only when circumstance so requires. Investigation by third parties does not establish the requisite nexus for taxation.

CONCLUSION

The decision of the court below is not supported by the grounds on which it purports to rest, and the questions presented herein are substantial. Appellant requests this Court to take jurisdiction of the present appeal.

Respectfully submitted,

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(Appendices follow)

Appendix A

In the Supreme Court of the State of California

S.F. 24557

Illinois Commercial Men's Association,
Plaintiff and Appellant,

v.

State Board of Equalization,
Defendant and Respondent.

National Liberty Life Insurance Company,
Plaintiff and Appellant,

v.

State Board of Equalization,
Defendant and Respondent.

[Filed Oct. 31, 1983]

We are asked to determine whether California may impose a tax on gross premiums collected by foreign insurers who solicit business in California by mail from outside the state, and who utilize independent contractors in California to perform functions incident to the acceptance of applications and the administration of claims. The significant element in making this determination is whether the contacts between the insurers and the state justify imposition of the tax under the due process clause of the Fourteenth Amendment to the United States Constitution.

Plaintiffs, Illinois Commercial Men's Association (IC) and National Liberty Life Insurance Company (NL) are organized in other states and each has its principal place of business in the state in which it is incorporated. Both companies sold accident, health, and life insurance policies in California by advertising in national publications and by direct mail solicitation of prospective customers. NL advertised in local publications as well. Neither plaintiff owned or leased property in California or employed agents or representatives to solicit business in this state. However, independent contractors acting on their behalf did perform certain acts in California in connection with the administration of claims and other matters. These activities will be described in detail below.

In 1965, the State of California for the first time made the assertion that unlicensed foreign insurers were subject to regulation by the state. NL obtained a certificate and license from the Department of Insurance (department) in August 1968. IC has never sought a license or certificate from the department, and has ceased to solicit business in California.

In May 1968, the department notified plaintiffs of its intention to assert their liability for the payment of a gross premium tax for the years 1963 through 1967, pursuant to article XIII, section 14⅓ of the California Constitution (now § 28), and Revenue and Taxation Code section 12201. These measures impose an annual tax on insurers "doing business in this state." Prior to this time, the state had not attempted to assess against plaintiffs a tax attributable to premiums received for direct mail insurance sold to California residents. The State Board of

Equalization (board) assessed gross premium taxes of $23,504.54 against IC for the years 1963 through 1967, and $47,747.50 against NL for the years 1963 through 1965. Plaintiffs paid the tax and filed claims for refund pursuant to sections 12978 and 12979 of the Revenue and Taxation Code.[1] The claims were denied, and these actions against the board seeking refunds followed. The trial court found in the board's favor, holding that the tax was justified in part on the ground that plaintiffs received a benefit from California by virtue of health and police services provided to their insureds. These services promoted the well-being of the insureds, reasoned the trial court, thereby improving "the odds on which the plaintiff insurers are gambling" by their issuance of policies to California residents. Plaintiffs appeal from the ensuing judgment.[2]

The United States Supreme Court has considered the circumstances under which a state may, within the limits of the due process clause, impose a tax on a foreign corporation that conducts its business by mail from outside the taxing state. Generally speaking, the taxing state must have a substantial interest in the transactions in order to justify imposition of the tax. This interest is measured by the extent and nature of the contacts between the state and the foreign corporation (such as the presence of agents of the corporation within the state), and the benefits conferred on the corporation by the state. (National Bellas Hess v.

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[1]Section 12978 sets forth time limitations on claims for refunds, and section 12979 provides that claims shall be in writing and state the specific grounds upon which they are founded.

[2]Although two separate actions are involved, the issues are similar as to both plaintiffs. Unless otherwise noted, the discussion which follows will be applicable to both.

Dept. of Revenue (1967) 386 U.S. 753, 756 (hereafter *National Bellas*).) (Plaintiffs vigorously contend that they have insufficient contacts with California and derive no benefits from this state to justify imposition of the tax.

Before discussing in detail the standards which allow a state to tax a foreign corporation and their application to the conduct of plaintiffs' business in California, we consider the board's claim that two cases, one decided by this court and one by the United States Supreme Court, have settled the question at issue. The board asserts that People v. United National Life Insurance Company (1967) 66 Cal. 2d 577 (hereafter *United National*) determined that mail order insurers may constitutionally be regulated by California, and that Connecticut General Life Insurance Company v. Johnson (1938) 303 U.S. 77, held a state which has the power to regulate a foreign insurer also has the power to tax it. Thus, the board maintains, it is unnecessary to assess anew the character of plaintiffs' contacts with California to uphold imposition of the tax.

In *United National*, after an exhaustive discussion of the history of state regulation and taxation of foreign insurers under the due process and the commerce clauses, we held unanimously that three mail order insurers (one of them NL), which solicited and negotiated insurance transactions with California residents exclusively by mail from offices located outside the state, could constitutionally be regulated by California.[3]

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[3]*United National* points out (66 Cal.2d 577 at pp. 583-584) that the McCarran Act (15 U.S.C. §§ 1011-1015), as interpreted in Prudential Insurance Company v. Benjamin (1946) 328 U.S. 408, 429-430, excepts state regulation of insurers from the restraints imposed by the commerce clause.

The board insists that this holding applies not only to state regulation of foreign insurers, but also to taxation of such entities. Plaintiffs claim, on the other hand, that contacts between a state and a foreign insurer which would justify regulation or the service of process would not be sufficient to warrant taxation (citing Jeter v. Austin Trailer Equipment Co. (1953) 122 Cal.App.2d 376, 381; Aldens, Inc. v. La Follette (7th Cir. 1977) 552 F.2d 745, 751, fn. 12), and that a foreign corporation may not be taxed by the state unless the state has conferred some benefits on the corporation and the corporation is present in the state.

The board counters with the United States Supreme Court's opinion in Connecticut General Life Insurance Company v. Johnson, supra, 303 U.S. 77, which, it claims, holds that the power to regulate and tax are congruent. That decision held invalid a California tax on premiums paid pursuant to reinsurance contracts entered into in Connecticut between a Connecticut insurer licensed to do business in California and other insurers also licensed here. However, since no act in the formation, performance or discharge of the contracts occurred in this state, and the contracts did not depend on any privilege or protection granted by the state, imposition of the tax was held to violate due process. In the course of its opinion, the court declared, "As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them." (At

p. 80.)[4] Plaintiffs challenge the board's interpretation of this language; they assert that the statement means only that a state which may not regulate a foreign corporation does not have the power to tax it.

We confess some doubt as to the meaning of the language quoted, but we cannot accept the correctness of the board's claim that the power to regulate a foreign insurer is always determinative of the power to tax it. The United States Supreme Court has applied substantially the same test to determine the validity under the due process clause of a tax on a foreign corporation both before and after its decision in *Connecticut General*. The relationship between the state and the insurer has been examined to determine whether there is "some definite link, some minimum connection, between a state and the person, property or transaction . . . [the state] seeks to tax" and whether the state has "given anything for which it can ask return." (*National Bellas*, 386 U.S. 753, at p. 756.)

Although the formulation of the test has varied to some degree, its substance has remained essentially the same in

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[4]The full paragraph in which the statement appears is as follows: "But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere." (At pp. 80-81.)

numerous decisions of the high court. (E.g., Moorman Mfg. Co. v. Bair (1978) 437 U.S. 267, 273 [tax unjustified "unless there is some minimal connection" between the activities of the interstate business and the taxing state]; Standard Steel Co. v. Wash. Revenue Dept. (1975) 419 U.S. 560, 562 ["whether the state has given anything for which it can ask return"]; Scripto v. Carson (1960) 362 U.S. 207, 211-212 ["the test is simply the nature and extent of the activities of the appellant in Florida"]; Wisconsin v. J.C. Penney Co. (1940) 311 U.S. 435, 444 [the question is whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits afforded by the state].) In the insurance context as well, the high court has considered the extent and nature of the contacts between the taxing state and the foreign insurer to determine whether the tax was justified under the due process clause. (E.g., State Bd. of Ins. v. Todd Shipyards (1962) 370 U.S. 451 [foreign insurer which carries on no activities, solicits no business, and has no office or agents in taxing state not subject to taxation].)

Plaintiffs rely heavily on *National Bellas*, supra, 386 U.S. 753, in support of their claim that the tax is invalid as to them. *National Bellas* was decided four days after *United National*, and it involved the validity of a tax imposed by Illinois upon a retailer, not licensed to do business in Illinois, and incorporated outside that state. The retailer sold goods to Illinois residents by means of catalogue solicitations and flyers sent to past and potential customers from outside the state. It did not maintain an office or other place of business in Illinois, had no agents, salesmen, or other representatives there to solicit business or to accept

payment for or deliver or service merchandise which it sold, and it owned no property in Illinois. All its contacts with Illinois residents were by mail or common carrier.

The high court, after stating the applicable test as set out above, held that imposition of the tax violated both the due process and the commerce clauses because a state may not impose a tax "upon a seller whose only connection with customers in the State is by common carrier or the United States mail." It distinguished between mail order sellers who do no more than communicate with customers in the state by such means as a part of a general interstate business, upon whom the tax could not be properly imposed, and sellers with retail outlets, solicitors, or property within the state, which are subject to taxation.

The board claims that *National Bellas* is distinguishable because it held the tax invalid under both the due process and commerce clauses, and because it involved a retailer rather than an insurer. The state has a special interest in insurance matters in view of the nature of insurance and the continuing relationship between the insurer and the state's residents; therefore, claims the board, the standards for state taxation of an insurer are more liberal than those applicable to a retailer. However, the opinion in *National Bellas* considered separately the requirements of the due process and commerce clauses, states that the standards under both provisions are similar, and holds that these provisions were violated by the Illinois tax. Moreover, while it is true that the states have a special interest in the business of insurance, and that interest justifies regulation of an insurer which has lesser contacts with the regulating state than other types of businesses,

we do not agree that this enhanced interest also justifies taxation of a foreign insurer under standards less stringent than those applicable to other enterprises. In fact, as we have seen, the United States Supreme Court applies substantially the same standards to insurers as to other businesses in determining whether a state has the right under the due process clause to tax a foreign corporation. (See, e.g., State Bd. of Ins. v. Todd Shipyards, supra, 370 U.S. 451.)

Thus, we cannot avoid an examination of the relationship between plaintiffs and California to determine whether the tax was justified under the standards set forth above.

The stipulated facts establish the following:

A person interested in purchasing an insurance policy would submit his application by mail to the plaintiffs' home office in another state. If the application was accepted, a contract was formed in the plaintiffs' home state, and a policy was mailed to the applicant.[5] Premiums were paid by mail.

In almost all cases, IC processed applications without investigation, although on an average of five or six times a year, it would request an independent contractor in California to confirm information set forth in an application.

IC sent 648,175 mail solicitations into the state between 1963 and 1965. It issued more than 105,000 policies in California, and approximately 3,318 claims were filed between 1963 and 1967 by California policyholders. When

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[5]NL also conducted solicitations by sending a policy to a prospective customer which could be accepted in California by executing a "validating certificate" and mailing it to the company.

an insured made a claim, IC's practice was to send a form to be completed by the claimant and his physician. Most claims were processed on the basis of these forms, but approximately 10 percent would not be processed until IC received confirming information from independent contractors in California, who collected information from doctors, hospital personnel, or police, and sometimes from the claimant, his family, or his representative.

Ordinarily, IC would pay a claim upon receipt of this additional information, but in certain difficult cases, it would ask another independent contractor in California to obtain confirming data. This contractor had authority to settle claims on behalf of IC. Between 1965 and 1968, 124 California claims were handled in this manner. Two claims resulted in lawsuits in California between 1963 and 1967. IC was represented by California attorneys in the litigation; both suits were ultimately settled.

NL generally processed applications without investigation. It had 885 life insurance policyholders in California between 1963 and 1965, and 38,167 accident and health policyholders. In that period, 7,745 claims were filed by California residents. During the processing of these claims, NL would on occasion request Retail Credit Company in Pennsylvania, an independent organization, to contact its California office to collect necessary data by interviewing doctors, hospital personnel, police, and other persons, and by obtaining copies of documents, such as the reports of doctors and police. Between 1963 and 1965, it utilized Retail Credit Company to collect information in connection with 2 percent of the claims filed. Retail used 175 representatives to conduct about 153 investigations in California on

behalf of NL, which paid approximately $3,785 for these services. This amount represented less than one-third of 1 percent of the premiums collected by NL. Retail was not authorized to offer or make settlements on behalf of NL.

Plaintiffs claim that, like the retailer in *National Bellas*, they have no employees or property in California, and their activities in this state amount substantially to communication with customers by mail. They assert that the application, verification, and claims procedures described above were minimal and sporadic, and were insufficient to justify imposition of the tax. We disagree.

We observe, first, the fact that a foreign corporation performs acts in the taxing state through persons it designates as independent contractors is not determinative of whether the nexus required for taxation is present. In Scripto v. Carson, supra, 362 U.S. 207, the high court considered the imposition of a tax on a foreign corporation by Florida. The corporation had entered into contracts with 10 salesmen who lived in Florida and who solicited orders for the products manufactured by the corporation. They forwarded these orders to the corporation's home office out of the state. The contracts designated each salesman as an "independent contractor." The corporation had no offices or property within Florida. Nevertheless, this arrangement provided a sufficient nexus to justify the tax. The labelling of the salesman as "independent" was not controlling, it was held, because it would "open the gates to a stampede of tax avoidance" if such a formal contractual designation were allowed to make a constitutional difference. (362 U.S. at p. 211.)

In the present case likewise, the circumstance that investigation and/or settlement services on behalf of plaintiffs in California were performed by independent contractors is of little constitutional significance. The undeniable fact is that they were acting as agents of plaintiffs. Although plaintiffs assert a distinction between the present case and *Scripto* because the salesmen in *Scripto* solicited business for the foreign corporation, whereas here plaintiffs' agents did not perform that function, we are unimpressed by such distinction. What is significant in the present context is that the investigation and settlement of claims is an integral and crucial aspect of the business of insurance. Either or both of these functions were performed with respect to California policyholders by agents of plaintiffs residing in this state.

The utilization by NL of 175 representatives to conduct 153 investigations in California in a 2 year period, and the investigation of 331 claims by IC's agents, who had authority to settle a substantial portion of such claims, cannot be viewed, as plaintiffs urge, as conduct so "sporadic," and "peripheral" to their business that it amounts only to the "slightest presence" by them in California for purposes of taxation. (National Geographic v. Cal. Equalization Bd. (1977) 430 U.S. 551 at p. 556.)

That plaintiffs' agents, whose offices were in California, received the protection of this state's laws can hardly be doubted. In *Scripto,* the "benefit" aspect of the constitutional test was not discussed, apparently on the assumption that a foreign corporation which has agents in the taxing state also receives the protection of that state's laws. And in Standard Steel Co. v. Washington Revenue Department,

supra, 419 U.S. 560, an out-of-state supplier was held to enjoy the protection and benefit of the state's laws because it employed in the taxing state a single employee who worked out of his home, and who "made possible the realization and continuance of valuable contractual relations" between the taxpayer and a Washington corporation. The taxpayer's assertion that its activities in Washington "were so thin and inconsequential" that it derived insufficient benefit to justify the tax "verges on the frivolous," declared the court. (419 U.S. at p. 562.) Similarly, in the present case, the agents employed by plaintiffs performed for them a function crucial to the administration of the insurance policies covering California residents. The benefits afforded to these agents also benefitted plaintiffs.*

We hold, therefore, that the character and extent of plaintiffs' activities in this state were sufficient to form the "definite link" and "minimum connection" required to justify imposition of the tax, and that plaintiffs received the benefit of this state's laws through the protections afforded to their agents in California.

Our conclusion is supported by decisions from other jurisdictions. In three cases, the power of a state to tax mail order insurers was upheld even though the activities of the

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*The board argues that, as the trial court held, plaintiffs received the benefit of California's health, police and court systems, since these protections and services had the effect of diminishing the claims made against plaintiffs on the policies sold to Californians. Plaintiffs counter that these benefits did not accrue to them because they took such services into account in setting insurance rates. Therefore, they assert, it is the California insureds rather than plaintiffs who gained from the benefits and services provided by the state. We need not resolve this debate in view of the conclusion we reach.

insurers in the taxing state were similar to or less extensive than those of plaintiffs. In Ministers Life and Casualty Union v. Haase (Wis. 1966) 141 N.W.2d 287, the insurer employed methods of solicitation similar to those in the present case for insurance contracts with individuals. Unpaid "group leaders" negotiated insurance contracts for some group policies, enrolled members, received the policies and premium notices, and collected and remitted premiums. There was no indication that local agents performed claims investigations. National Liberty Life Insurance Company v. State (Wis. 1974) 215 N.W.2d 26 upheld a tax on a foreign mail order insurer largely on the basis of the substantial volume of business enjoyed by the insurer in the state.

Armed Forces Co-op etc. v. Department of Insurance (Wyo. 1980) 622 P.2d 1318, involved a foreign insurer which was an unincorporated, nonprofit military association, all of whose members were active or retired military personnel. The insurer urged its members in Wyoming to solicit others to buy insurance. It had no paid representatives, salesmen, offices or property in Wyoming and had only 99 policies in force in that state. Most claims were paid without investigation but, if the insured chose, he could seek to have the claim evaluated by a professional claims adjuster or a volunteer advisory board consisting of three unpaid persons, or he could obtain a statement from a local official or disinterested witness concerning the circumstances of the loss.

While the foregoing cases related to the power of the state to both regulate and tax a foreign insurer, we do not deem this circumstance significant. It should also be noted that the United States Supreme Court dismissed appeals

for want of a substantial federal question in *Ministers* (385 U.S. 205) and *Armed Forces Co-op* (454 U.S. 1130). Such dismissals constitute a determination on the merits. (Washington v. Yakima Indian Nation (1979) 439 U.S. 463, 476-477, fn. 20; Hicks v. Miranda (1975) 422 U.S. 332, 344-345; Eaton v. Price (1959) 360 U.S. 246, 247.)

The parties cite numerous other cases in addition to those discussed above in support of their positions, but the facts are so clearly distinguishable from the present circumstances that it would serve no useful purpose to discuss them in detail. (E.g., *Authority to tax foreign corporation denied:* Norton Co. v. Dept. of Revenue (1951) 340 U.S. 534 [direct orders mailed to and shipped from foreign corporation out of state]; Miller Bros. Co. v. Maryland (1954) 347 U.S. 340 [purchases made in foreign state; advertising and delivery of goods by common carrier and occasionally by retailer's own trucks in taxing state]; St. Louis Cotton Compress Co. v. Arkansas (1922) 260 U.S. 346 [no act by foreign insurer in taxing state but insured property located there]; *Authority to tax foreign corporation affirmed:* Felt & Tarrant Co. v. Gallagher (1939) 306 U.S. 62 [payment for goods mailed to retailer outside state, but retailer had sales agents in state]; General Trading Co. v. Tax Comm'n. (1944) 322 U.S. 335 [traveling salesmen from state of foreign corporation's domicile traveled to taxing state to solicit sales].)

Our conclusion that the contacts between plaintiffs and California are sufficient to justfy imposition of the tax are also important to the resolution of two additional contentions made by plaintiffs.

First, they argue, they were not "doing business" in California within the meaning of article XIII, section 28, subdivision (b), of the California Constitution which, as we have seen, provides for a tax on insurers "doing business" in this state. They rely on three cases for the proposition that the state in which administrative functions in connection with insurance policies are performed is of "great significance" in evaluating whether a foreign corporation is "doing business" in California. (Occidental L. Ins. Co. v. State Bd. of Equal. (1956) 139 Cal.App.2d 468; People v. Alliance Life Ins. Co. (1944) 65 Cal.App.2d 808; Western T. Acc. Assn. v. Johnson (1936) 14 Cal.App.2d 306.) Of these cases, only *Alliance* invalidated a tax based on insurance premiums. That case, unlike the present one, did not involve the employment by the insurer of agents within California to perform important functions in connection with the administration of the policies it had issued to this state's residents.[1] These activities are sufficient to justify the conclusion that plaintiffs' were "doing business" in this state within the meaning of the Constitution.

Next, plaintiffs urge, the tax is invalid as a violation of due process and equal protection because it is measured by the total premiums collected from California policyholders, and therefore reaches "profits which are in no just

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[1]In *Alliance*, the insurer had ceased soliciting business in California and did not renew its certificate of authority to conduct business in this state, nor did it write any new policies. It did, however, continue to collect renewal premiums from California residents on policies effective before it surrendered its license. These premiums were mailed to Illinois. The state's attempt to tax these renewal premiums was held invalid on the ground that the insurer was no longer "doing business" in California.

sense attributable to transactions" within this state. (See Hans Rees' Sons v. No. Carolina (1931) 283 U.S. 123, 134-135.) Plaintiffs contend the premiums they received from California policyholders were generated largely by activities carried out in their home states, and California's imposition of the tax on the whole of the premiums collected is "out of all appropriate proportion to the business transacted" in California.

A number of cases have held that a tax based on the total sales made within a state is not invalid even though some activities (including major functions such as the manufacture of the product) occurred in other jurisdictions. Standard Steel Co. v. Washington Revenue Department, supra, 419 U.S. 560, upheld a Washington tax based on the total sales of a manufacturer in the taxing state even though its home office and manufacturing plants were located outside the state. Aside from periodic visits by the taxpayer's engineers to its principal customer in Washington, the corporation's total activity in Washington consisted of the employment of a single employee who worked out of his home and consulted with the customer regarding its needs, and followed up if any difficulties arose after delivery of the product. It was held that the tax was "apportioned exactly to the activities taxed," i.e., the sales which resulted from the activities of the taxpayer's employee in Washington, who "made possible the realization and continuance of valuable contractual relations" between the taxpayer and the corporation. (419 U.S. at pp. 562, 564.) A similar result obtained in General Motors v. Washington (1964) 377 U.S. 436, 448, in which a tax on the wholesale price of automobiles and parts manufactured outside Washington was

upheld on the ground that the taxpayer had mingled its taxable business with that which it claimed to be nontaxable through "a maze of local connections."

In Moorman Mfg. Co. v. Bair, supra, 437 U.S. 267, an Iowa tax on the gross sales of products manufactured by a foreign corporation in another state was held to be valid even though the court recognized that the profit from the sales was generated in part by the corporation's activities in the foreign state. The opinion comments that the states have a "wide latitude in the selection of apportionment formulas," and an assessment will only be disturbed if "the taxpayer has proved by 'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportions to the business transacted . . . in that State,' . . . or has 'led to a grossly distorted result.'" (437 U.S. at p. 274.)*

Finally, in Equitable Life Society v. Pennsylvania (1915) 238 U.S. 143, Pennsylvania imposed a tax on the gross premiums written on policies which covered residents of that state, even though some of the premiums were paid outside the state by Pennsylvania residents. In upholding Pennsylvania's right to tax such premiums, the court noted that a certain latitude must be allowed in measuring the tax, that many incidents of the contract occurred in Pennsylvania (such as payment of dividends when received in

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*The tax in *Moorman* was not based on gross sales made in Iowa, but it was unapportioned in the sense that it was measured by the proportion which the sales made within the state bore to the gross sales of the taxpayer. Since the formula did not take into consideration the fact that some of the amounts realized from the Iowa sales may have been attributable to the state in which the goods were manufactured, the tax was "unapportioned" in the respect we discuss here.

cash, sending an adjuster into the state in case of dispute, or making proof of death), and that it was "not unnatural" to take the policyholders residing in Pennsylvania as a measure of the tax because taxation "has to be determined by general principles." (238 U.S. at p. 147.)

While these cases are distinguishable on their facts, they state principles which are applicable to the tax under consideration here: an unapportioned tax measured by the total sales of a foreign corporation within a state may be valid even though major functions which contributed to the value of the taxed product, such as its manufacture, occur outside the taxing state; the importance of the foreign corporation's activity in the taxing state to the "realization and continuance" of the corporation's business therein is a significant factor in evaluating the contacts between the state and the corporation; and the taxpayer challenging the failure to make an apportionment has the burden of showing by "clear and cogent" evidence that the tax is out of all proportion to the business transacted in the state and leads to "grossly disproportionate results."

Plaintiffs have not made such a showing here. Their agents in California conducted on their behalf a substantial number of investigations of claims made by California policyholders. Although the number of these investigations was not overwhelming in comparison with the over-all number of claims filed by this state's residents—most claims could be processed without local investigation—whenever such investigations were required because telephone or mail inquiries were inadequate to resolve plaintiffs' questions regarding the claims, they were conducted

by plaintiffs' agents in California. Indeed, IC's agents had the power to conclude settlements on its behalf. Moreover, as we have observed, the investigation of claims is an important and integral part of the business of insurance; the conduct of plaintiffs' agents was critical to the "realization and continuance" of the business conducted by plaintiffs in this state. We conclude, therefore, that plaintiffs did not show by "clear and cogent" evidence that the unapportioned tax on the premiums of California policyholders is out of all proportion to the conduct of their business in this state, so as to lead to "grossly disproportionate results."[9]

Plaintiffs' final argument is that the state should be estopped to impose the tax retroactively. They claim that they justifiably relied on the general understanding in the legal community and the insurance industry prior to 1968 —when the state first sought to impose the tax in issue— that mail order insurers were not subject to a tax on premiums,[10] and that affirmative representations to that effect were made to them by a California official. They urge that it would be unjust to allow the state to levy a tax upon them retroactively in view of such reliance, particularly

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[9]National Liberty Life Insurance Co. v. State, supra, 215 N.W.2d 28, concluded that a tax on gross premiums of a mail order insurer was invalid because it was unapportioned. The board challenges this conclusion on its merits, but we need not discuss the reasoning of the decision in detail since in that case, unlike the situation here, there was no evidence of claims settlement activity in Wisconsin by the foreign insurer.

[10]Plaintiffs rely, for example, on a report of the National Association of Insurance Commissioners in 1968 that direct mail insurers "have ample reason to suppose" that they are not subject to taxation. (See also Hanson & Obenburger *Mail Order Insurers* (1966) 50 Marq.L.Rev. 175.)

because they are unable to recoup the tax from the insureds.

United States Fidelity & Guaranty Company v. State Board of Equalization (1956) 47 Cal.2d 384, sets forth the general rules applicable to estoppel of the government in tax matters. Estoppel is available only in the "unusual case" in which its justification is "clear and the injustice great." The failure to collect the tax authorized by a statute is insufficient to justify estoppel, even if the taxpayer relies on an erroneous construction of a statute by an official. (*Id.* at pp. 389-390.) Nevertheless, the opinion proceeds to discuss whether certain conduct of the Insurance Commissioner constituted a "clear representation" that a portion of the insurer's premiums in that case would not be taxed. It concludes that the commissioner's conduct was not such "as would satisfy an estoppel in connection with taxes." (*Id.* at p. 392.) We need not decide whether even a "clear representation" by a public official that a tax is not payable can immunize a taxpayer from the duty to pay a tax authorized by law, because we determine that such representation was not made in the present case.

The "clear representation" relied on by plaintiffs is contained in a letter written in 1961 by an official in the compliance and legal division of the department stating, "[t]he laws of this State do not, and it is our understanding that they could not constitutionally regulate the transaction of insurance through the United States mail."

The letter was written to an individual in NL's home state who acted as a consultant to the president of NL, and there is no indication that IC was aware of its content. IC's reliance argument, therefore, is based largely

on the state's omission to collect the tax and assumptions made by a national organization and others that the tax would be invalid if it were imposed. Obviously, these matters are insufficient to constitute justifiable reliance.

NL's claim that the 1961 letter provides a basis for such reliance is unconvincing. The letter does not refer to state taxation of mail order insurers, but to their regulation, and NL could not properly have relied on the statements made therein as referring to taxation. The basis of NL's claim to the contrary is its premise that a state which does not have the power to regulate a mail order insurer a fortiori does not have the power to tax it, since a higher level of contacts is required for taxation than for regulation. Thus, it is argued, the statement in the letter referring to regulation also amounted to a representation relating to taxation.

Assuming, without deciding, the validity of NL's premise that a state without power to regulate also cannot tax, there is no indication in the letter that the official who wrote it made the representation upon that assumption. In any event, NL could not have justifiably relied upon any such representation. The letter was written not by an official of the board which is the agency authorized to assess the tax (Rev. & Tax. Code, § 12412), but by an official of the department.[11] NL never sought a ruling or made any inquiry of the board regarding the state's position on taxation of mail order insurers. Moreover, the letter refers only

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[11]We recognize, of course, that the Insurance Commissioner performs some duties with regard to the tax, such as forwarding the tax returns of the insurer to the board (Rev. & Tax. Code, § 12411), auditing the return (§ 12421), and proposing deficiency assessments to the board when appropriate (§12422).

to an "understanding" of state law with respect to regulation, and cannot reasonably be interpreted as a definitive ruling on the question of taxation. Under all the circumstances, we hold that NL failed to establish that it justifiably relied on a statement by a public official that the premiums received from California residents were not subject to taxation.[12] It is hardly necessary to observe that this is not the "unusual case" in which justification for the estoppel is "clear and the injustice great."

The authorities cited by plaintiffs in support of their claim of estoppel are not persuasive. For the most part they involved attempts to retroactively impose a tax following amendment of a statute (Equitable Life Assur. Soc. v. Thulemeyer (Wyo. 1935) 52 P.2d 1223, 1234) or a change in an official administrative ruling (Garrison v. State of California (1944) 64 Cal.App.2d 820, 828-830), a clearly distinguishable situation from the present case.[13]

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[12]In *United National*, supra, 66 Cal.2d 577, 596-597, the same letter was held insufficient to constitute a binding administrative construction of a statute which was there interpreted to allow regulation of mail order insurers, and the failure of the state to attempt such regulation under the statute for many years was held insufficient to justify estoppel of the state to initiate regulation.

[13]Pacific Southwest Airlines v. State Board of Equalization (1977) 73 Cal.App.3d 32, is not contrary to our conclusion. That case concerned a ruling by the board which added a qualification for exemption from the sales tax. The ruling was held invalid as an administrative regulation because the board had failed to follow the statutory procedures for adoption of such a regulation, which would have afforded the taxpayer notice thereof. The facts and issues involved in that case are obviously different than those we consider here. Estoppel was not in issue and the board's interpretation of the requirements for an exemption was held to be invalid. We do not read the language of the opinion, as plaintiffs urge, to require that

The judgment is affirmed.

Mosk, J.

WE CONCUR:

Bird, C.J.

Richardson, J.

Kaus, J.

Broussard, J.

Reynoso, J.

Grodin, J.

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a taxpayer must receive advance notice of the state's "new understanding" of the meaning of a tax statute to justify imposition of a tax.

Plaintiffs also rely on the recent decision of the United States Supreme Court in Arizona v. Norris (1983) ... U.S. ..., which holds that an employer violated title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) by offering female employees lower monthly retirement benefits than male employees who made the same contribution to the retirement fund. The majority adopted Jusice Powell's opinion on the issue of retroactivity, which holds that the decision should not be retroactively applied, because of certain policy considerations. This opinion is not convincing authority in the present case. The primary factors justifying nonretroactivity there do not apply here (i.e., a "devastating" financial effect on the State of Arizona and other governmental bodies, and the likelihood that employers reasonably relied on a prior decision of the high court which led them to believe that their conduct was legal). Moreover, the case does not involve estoppel or the failure of the government to impose a tax authorized by law. In the tax context, even changes in formal rulings have been applied retroactively. (See, e.g., Dixon v. United States (1965) 381 U.S. 68, 73; Automobile Club v. Commissioner (1957) 353 U.S. 180, 183-186; Benedict Oil Co. v. United States (10th Cir. 1978) 582 F.2d 544, 549; see also Diedrich v. Commissioner (1982) 457 U.S. 191, 200, fn. 10.)

Illinois Commercial Men's Association v.
State Board of Equalization
National Liberty Life Insurance Company v.
State Board of Equalization
S.F. 24557

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Trial Court & No.:	San Francisco Superior Court No. 608-989; 650-415; 650-322
Trial Judge:	The Hon. Edward L. Cragen

Appendix B

In the Court of Appeal of the State of California

First Appellate District, Division Three

A013319
1 Civ. No. 53866

A013320
1 Civ. No. 53867

Illinois Commercial Men's Association,
Plaintiff and Appellant,

v.

State Board of Equalization,
Defendant and Respondent.

National Liberty Life Insurance Company,
Plaintiff and Appellant,

v.

State Board of Equalization,
Defendant and Respondent.

[Filed March 2, 1983]

Plaintiffs Illinois Commercial Men's Association, a corporation, and National Liberty Life Insurance Company, a corporation, filed separate actions against defendant State Board of Equalization, seeking refunds of taxes allegedly erroneously and illegally assessed and collected. After the actions were consolidated for trial and tried on stipulated facts, judgments were entered for defendant. Both plaintiffs

Certified for Publication

have appealed. The primary question in these cases is whether California can constitutionally impose a gross premiums tax on foreign insurance companies which solicit and negotiate insurance transactions with California residents by mail from outside the state, and which occasionally hire independent contractors within the state to facilitate the processing of claims.[1]

The Facts

Both Illinois Commercial Men's Association (hereafter ICMA) and National Liberty Life Insurance Company (hereafter NL) were organized in other states; each has its principal place of business in the state of its incorporation.[2] During the years in question, both companies marketed accident, health, and life insurance policies in California by advertising in national publications and by direct mail solicitation of prospective customers; NL advertised in local publications as well.[3]

Persons interested in insurance submitted applications by mail to the company's home office. If the application was accepted, a contract of insurance was formed in the company's home state, and a policy was mailed to the applicant. NL also utilized some solicitations containing a policy which a California resident could accept by mailing a

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[1]Because this issue is common to both cases, and because the facts in each case are similar, we dispose of the two appeals in this single decision. (See *Seibert v. Sears, Roebuck & Co.* (1975) 45 Cal.App.3d 1, 4.)

[2]ICMA was incorporated in Illinois, NL in Pennsylvania.

[3]The insurance sold by NL to California residents was actually marketed by DeMoss Associates, Inc. (hereafter DeMoss), a Pennsylvania corporation. Pursuant to an agreement between the two, NL was to pay all premium taxes on policies which it underwrote.

"validating certificate" to the company. Payment of subsequent premiums was by mail. In most instances, ICMA applications were processed without investigation, although on an average of five or six times a year, ICMA would request independent contractors within the state to confirm application information. Applications for policies underwritten by NL were generally processed without investigation.

Between 1963 and 1968, ICMA issued over 105,000 policies in California. Between 1963 and 1967, approximately 3,318 claims were filed by its California policyholders. When an insured made a claim, ICMA would send a form to be completed by the claimant and his physician; most claims were processed upon return of those forms. Approximately 10 percent of claims would not be processed until ICMA received confirming information from the independent contractors in California, who collected data from physicians, hospital personnel, police, and in some instances from the claimant, his family, or his representatives. After receiving this added information, ICMA would usually process and pay the claim. In a few difficult cases, where the above procedure did not result in claim resolution, another independent contractor in California was requested to obtain confirming information; that contractor had authority to settle on behalf of ICMA. Between 1965 and 1968, 124 California claims were handled in this manner. Between 1963 and 1967, two claims resulted in lawsuits in California, both of which were settled.

Between 1963 and 1965, the estimated total number of NL's life insurance policyholders was 885, and its accident and health policyholders, 38,167. During those years, 7,745

claims were filed by California residents. During the processing of claims, NL occasionally asked Retail Credit Company (hereafter Retail), an independent organization, to collect necessary data by interviewing doctors, hospital personnel, police, and other persons, and by obtaining copies of documents such as physicians' and police officers' reports. During 1963-1965, NL utilized Retail in processing about two percent of its claims. Retail used 175 representatives to conduct approximately 153 investigations in California on behalf of NL, for which the insurance company paid fees of approximately $3,785. Retail was not authorized to offer or make settlements on NL's behalf.

Neither ICMA, NL, nor DeMoss owned or leased any property in California. Neither employed agents, representatives, quasi-agents, "missionary men," nor group organizers to solicit business in the state. The only persons who acted in California on the companies' behalf were the independent contractors whose activities have been detailed above.

Sometime in 1965, the state publicly took the position that unlicensed foreign mail-order insurers were subject to regulation by the state. In August 1968, NL did become licensed and certificated by the state's Department of Insurance. ICMA is not now and never has been licensed by nor had a certificate of authority from the Department of Insurance, and has ceased soliciting insurance business in this state.

In May 1968, the department notified plaintiffs of its intention to assert liability for gross premium taxes for the years 1963 through 1967 pursuant to article XIII, sec-

tion 14-4/5 of the California Constitution (renumbered § 28 in 1974), and Revenue and Taxation Code section 12201.[4] At no time prior had the state assessed or attempted to assess a tax upon the premiums received by plaintiffs from their direct mail insurance sold to California residents. The State Board of Equalization assessed premium taxes against NL and ICMA for the years 1963 through 1967. ICMA paid the assessment, which totaled $23,504.54. NL paid gross premium taxes for the years 1963 through 1965 and the interest thereon, totaling $47,747.50. NL and ICMA subsequently filed claims for refund of premium taxes pursuant to Revenue and Taxation Code sections 12978 and 12979, which were denied. These actions followed.

Discussion

Plaintiffs' principal argument is that the taxes which the state has imposed violate the due process clause of the Fourteenth Amendment of the United States Constitution. The due process clause restricts a state's power to tax income generated by the activities of an interstate business by requiring some definite link or minimum connection between those activities and the taxing state. (*Moorman Mfg. Co. v. Bair* (1978) 437 U.S. 267, 273; *Nat. Bellas Hess v. Dept. of Revenue* (1967) 386 U.S. 753, 756.) The controlling question in determining whether a state tax is permissible is whether the state has given anything for which it can

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[4]At all times relevant herein, article XIII, section 14-4/5 of the California Constitution provided in pertinent part: "An annual tax is hereby imposed on each insurer doing business in this state . . . ." Revenue and Taxation Code section 12201 provides in part: "Every insurer doing business in this State shall annually pay to the State a tax . . . ."

ask return. (*Ibid.*) In other words, the test is ". . . whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state." (*Wisconsin v. J. C. Penney Co.* (1940) 311 U.S. 435, 444.)

In general, the imposition of a tax on a foreign corporation by a state has been upheld against a due process challenge where the corporation has property or solicitors or retail outlets within that state. (See, e.g., *Moorman Mfg. Co. v. Bair, supra,* 437 U.S. 267 [corporation had over 500 salesmen and six warehouses in taxing state]; *Standard Steel Co. v. Wash. Revenue Dept.* (1975) 419 U.S. 560 [corporation had only one employee in taxing state, but he made possible realization and continuation of contractual relations between local consumer and taxpayer corporation]; *Scripto v. Carson* (1960) 362 U.S. 207 [corporation had no office, warehouse, or other place of business in taxing state and had no regular employee or agent there, but 10 independent contractors acted as representatives of corporation in the state for purpose of soliciting business].) The Supreme Court has cautioned, however, that it will take more than the "slightest presence" of a foreign corporation to establish the requisite constitutional "nexus" or connection. (*National Geographic v. Cal. Equalization Bd.* (1977) 430 U.S. 551, 556.)

In contrast, in *Nat. Bellas Hess v. Dept. of Revenue, supra,* 386 U.S. 753, the Supreme Court held that Illinois could not impose use tax liability on an out-of-state seller whose only connection with customers in that state was by common carrier or mail. National, a mail-order seller centered in Missouri, had no office, sales outlets, warehouses, salesmen, solicitors, or telephone listings in Illinois, and

did not advertise in Illinois newspapers or on radio or television there. Twice yearly it mailed catalogues to recent customers nationwide, and also mailed advertising to past and potential customers. All customer orders were mailed to Missouri, and goods were sent to customers by mail or common carrier. (*Id.*, at pp. 754-755.)

The court noted that strictly speaking, the person the state sought to tax was the user of goods to whom the company sold, and that there was no question of the connection between the state and that person. But because National was made directly liable for payment of the use tax whether collected from the user or not, the critical question was the connection between that company and the state. (*Nat. Bellas Hess, supra*, at p. 757, fn. 9.) To permit the tax, the court declared, would require the repudiation of "the sharp distinction which [we] have drawn between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business. But this basic distinction . . . is a valid one, and we decline to obliterate it." (*Id.*, at p. 758.) Where the out-of-state seller has solicitors or a retail outlet in the taxing state, that seller has been accorded the protection and services of the taxing state. Where the seller's only connection with customers in a state is by common carrier or mail, however, the seller is not receiving benefits from that state for which it can exact a price. (*Ibid.*)

The dissenters in *Nat. Bellas Hess* pointed out that National utilized Illinois' banking and credit facilities to carry on its business in that state, as a substantial part of its

sales were on credit. In addition, the dissenters thought it reasonable to assume that the company utilized local representatives to collect any delinquent accounts. (*Nat. Bellas Hess, supra,* 386 U.S. at p. 762 [dis. opn. of Fortas, J.].) As the majority ignored those local connections, however, we can only conclude that it considered them either too indirect or too insubstantial to satisfy its constitutional standard of nexus.

Plaintiffs rely on *Nat. Bellas Hess* to argue that because neither company had property nor agents soliciting business within California, the links between them and the state are constitutionally insufficient to allow the imposition of the taxes at issue. In reply, the state argues that the California Supreme Court in *People v. United National Life Ins. Co.* (1967) 66 Cal.2d 577, appeal dismissed 389 U.S. 330, has already determined that the state has power to tax mail order insurers. The state argues that *Nat. Bellas Hess* is not controlling because the insurance business is different from the mail-order retail sales business, and because plaintiffs' contacts with this state were significantly greater than those of National with Illinois.

The question in *People v. United National Life Ins. Co., supra,* 66 Cal.2d 577, was whether California could, in accordance with principles of due process, regulate foreign mail-order insurers who had no agents in the state and who solicited and negotiated insurance transactions with California residents exclusively by mail from offices outside the state. In resolving that question, the court traced the development of state regulation and taxation of the insurance business, and noted that with the passage of

the McCarran Act (15 U.S.C.A. §§ 1011-1015) in 1945, Congress removed all commerce clause limitations on the authority of the states to regulate and tax the insurance business. (*Id.*, at p. 585; see *Western & Southern L. I. Co. v. Bd. of Equalization* (1981) 451 U.S. 648, 653.) The court then analyzed federal due process clause limitations on a state's power both to regulate and to tax insurance companies, and concluded that interstate insurance transactions can properly be regulated when they have sufficient contacts with the regulating state so as to give the latter a "substantial interest" in the transactions. The court flatly rejected the argument that the power to regulate turned on the presence of agents in the regulating state.

The court then held that in the cases before it, there were sufficient contacts with California to justify regulation. "The insureds are, of course, residents of California. The solicitation of insurance actually takes place in California where the advertising material and other forms are received by the individual addressees. Thus realistically viewed the insurer through the instrumentality of the mail is for all practical purposes soliciting insurance here as manifestly as if it were to carry on such solicitation through representatives physically present within this state. [Citations.] In response to this solicitation, California residents complete and sign in this state the applications for insurance. Indeed, defendant United sends to the California addressee a pre-indorsed policy which becomes effective *in this state*, when the policyholder deposits in the mail here the completed 'ownership application' for return to United's home office. In all instances payment of premiums is made by California residents from funds or bank ac-

counts located in California. It is clear that any claims made under the policies will most likely be investigated in this state and that any litigation in connection with the policies will undoubtedly be commenced in California courts. It is also forseeable [*sic*] that should defendants for any reason fail to perform their obligations in accordance with the policies, California might be called upon to provide assistance for the persons within its borders who were intended to be financially assisted by the benefits under the policies." (*People v. United National Life Ins. Co., supra*, 66 Cal.2d at p. 593, fns. omitted.)

In *Conn. General Co. v. Johnson* (1938) 303 U.S. 77, California sought to impose a tax on premiums received by a Connecticut insurer in that state for policies which it issued to other insurance companies, reinsuring them against loss on life insurance policies which they issued to California residents. The state attempted to justify the tax as imposing no burden on the insurer in light of deductions which it was allowed on its other business within the state. The court rejected that argument, stating, "[b]ut the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, *we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within it boundaries of a foreign corporation*

admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. [Citations.] It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within." (*Id.*, at pp. 80-81, emphasis added.)

Relying heavily upon the underscored language, the state contends that at least with respect to insurance companies, its power to tax is coextensive with its power to regulate. Therefore, the state reasons, the issue in these cases was necessarily decided in its favor years ago when the California Supreme Court rendered its decision in *United National Life Ins. Co., supra*, 66 Cal.2d 577 (hereafter *United National*). We disagree. We read the *Conn. General* court's reference to a state's regulatory power as marking the outer limits of its power to tax: a state only has constitutional power to tax a foreign corporation which it also has power to regulate. It does not necessarily follow, however, that the presence of the power to regulate is always accompanied by the power to tax. The taxability of mail order insurers such as plaintiffs was not at issue in *Conn. General*, and it is axiomatic that a case is not authority for a proposition not considered therein. (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.) Furthermore, the critical question in deciding whether a state has jurisdiction to tax is whether the state has given anything for

which it can ask return. (*Nat. Bellas Hess, supra*, 386 U.S. at p. 756; *Wisconsin v. J. C. Penney Co., supra*, 311 U.S. at p. 444.) That question was neither answered nor even asked in *United National*. While we recognize that the court in *United National* relied on cases involving taxation as well as regulation in reaching its conclusion, "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.' [Citation.]" (*Canales v. City of Alviso* (1970) 3 Cal.3d 118, 127-128, fn. 2.)

We must decide, then, whether plaintiffs' contacts with California are such that the state has provided protection, opportunities, and benefits to these companies for which it can fairly ask return. (See *Wisconsin v. J. C. Penney Co., supra*, 311 U.S. at p. 444.)

Neither plaintiff had any employees, agents, representatives, nor quasi-agents soliciting business in California. Nor did either have any interest in real property here. Nevertheless, we recognize that unlike the mail-order seller in *Nat. Bellas Hess*, plaintiffs were not sellers whose *only* connections with their California customers were by mail. The insurance business is markedly different from the retail sales business, as the sale of an insurance policy commences a continuing relationship between the insured and the insurer which is likely to result in the filing of a claim; investigation and negotiation may follow prior to payment or settlement. While these plaintiffs handled the processing of insureds' claims almost exclusively by mail, each, in a small percentage of cases, used independent contractors in the state to investigate claims. Moreover, ICMA on a few

occasions authorized such independent contractors to settle claims on its behalf. We recognize that labeling individuals as "independent contractors" is of no constitutional significance if they in fact function as salesmen in a state soliciting and securing a substantial flow of business for a foreign company. (See *Scripto v. Carson, supra,* 362 U.S. at p. 211.) In these cases, however, the independent contractors had absolutely no part in the solicitation of insurance for either company, and their activities were of relatively little overall significance in the conduct of either company's business. Ninety percent of ICMA's claims during the four years at issue were processed without any activity in this state by claims investigators. Between 1963 and 1965, about 98 percent of NL's claims were processed without investigator assistance in this state. We view the occasional activities in this state of independent contractors on behalf of these companies as akin to those which the Supreme Court by implication found constitutionally insignificant in *Nat. Bellas Hess,* and conclude that they were insufficient to establish the minimum link necessary to make the state's tax permissible.

We also reject the state's argument that the tax is justified because plaintiffs were benefitted by the protections which the state affords to its residents, many of whom are plaintiffs' insureds. In effect, the state argues that the mere presence of insured persons or property within a state is sufficient to justify the imposition of taxes on an insurance company by that state; however, the law is otherwise. (See *Conn. General Co. v. Johnson, supra,* 303 U.S. 77; see also *State Bd. of Ins. v. Todd Shipyards* (1962) 370 U.S. 451;

but see *National Liberty Life Ins. Co. v. State* (Wis. 1974) 215 N.W.2d 26, 34.)

In sum, we conclude that neither plaintiff in these cases had the minimum connection with California necessary to justify the state's imposition of a gross premiums tax. Accordingly, we need not consider plaintiffs' remaining contentions.

Judgments are reversed, and the trial court is directed to enter judgments in favor of plaintiffs and against defendant.

CERTIFIED FOR PUBLICATION

SCOTT, J.

We concur:

WHITE, P.J.

BARRY-DEAL, J.

A013319, 1 Civ. 53866, Illinois Commercial Men's Association v. State Board of Equalization

A013320, 1 Civ. 53867, National Liberty Life Insurance Company v. State Board of Equalization

Trial Court:

Superior Court, City and County of San Francisco

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A013319, 1 Civ. 53866, Illinois Commercial Men's Association v. State Board of Equalization

A013320, 1 Civ. 53867, National Liberty Life Insurance Company v. State Board of Equalization

Appendix C

California Superior Court
City and County of San Francisco

Department Number Three

Nos. 608989, 650415
No. 650322

Illinois Commercial Men's Association, a corporation,
Plaintiff,

vs.

The State of California, and the
State Board of Equalization thereof,
Defendants.

National Liberty Life Insurance Company, a corporation,
Plaintiff,

vs.

The State Board of Equalization,
Defendant.

[Filed August 21, 1979]

MEMORANDUM OF OPINION

Background:

The parties have submitted a 'Stipulation as to Facts.' Plaintiffs, Illinois Commercial Men's Association (ICMA) and National Liberty Life Insurance Company (National Liberty), are insurers incorporated in Illinois and Pennsylvania respectively. During the years 1963-1967, plaintiffs operated mail-order insurance business with California residents, as well as with residents of other states.

Under a certificate issued by the California Insurance Commissioner, National Liberty continues to sell mail order insurance here. ICMA ceased selling insurance in the state after 1967.

During the four years in question (1963 through 1967) plaintiffs marketed their insurance in California primarily through ads in newspapers, magazines, some on radio, and direct mail solicitation to California residents. The majority of the insurance contracts were formed upon acceptance by the company of an application completed by the California domiciliary and mailed to the company in the latter's home state. Others were actually formed in California, using a somewhat different acceptance format.

Neither plaintiff had any actual employees, agents, or representatives in California, nor did either have interests in any real or personal property here. Both plaintiffs did hire "independent contractors" who engaged in business in California on their behalf, such as claims investigators, examining doctors and attorneys (for processing litigated claims.)

Issues Presented:

The primary issue is whether plaintiffs' activities constituted "doing business" in this state sufficiently to bring them within the constitutional and statutory provisions which would allow California to levy a premiums tax on insurers for the privilege of doing business within the state. If plaintiffs are found to be taxable, then the court must determine whether the tax as it is now imposed is fairly apportioned to the activities within this state, and also

whether the state may impose the tax retroactively for the period in question, 1963-1967, as defendant did not notify plaintiffs of the tax imposition until 1968.

Constitution and Statutes Applicable:

1. Article XIII, Section 28, of the California Constitution, states, *inter alia:*

> "(a) 'Insurer,' as used in this section, includes insurance companies or associations and reciprocal or interinsurance exchanges together with their corporate or other attorneys in facts considered as a single unit and the State Compensation Insurance Fund. As used in this paragraph, 'companies' includes persons, partnerships, joint stock associations, companies, and corporations.
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> "(b) An annual tax is hereby imposed on each insurer doing business in this state on the base, at the rates, and subject to the deductions from tax hereinafter specified."

II. Revenue and Taxation Code 12201 states, *inter alia:*

> "Every insurer doing business in this state shall annually pay to the State a tax on the bases, at the rates, and subject to the deductions from the tax hereinafter specified."

III. Insurance Code Section 700 states, *inter alia:*

> "A person shall not transact any class of insurance business in the state without first being admitted for such class. Such admission is secured by procuring a Certificate of Authority from the Commissioner . . ."

California Precedent:

Prior to 1967, California neither regulated nor taxed strictly mail-order insurers. The regulation aspect was

expressly changed by the California Supreme Court in *People v. United National Life Insurance Company*, 66 Cal. 2d 577, 58 Cal.Rptr. 599 (1967), *appeal dismissed*, 389 U.S. 330 (1967). The controversy regarding the taxation aspect which is now before this court arose in 1968 when defendant state, notified the plaintiff companies that it was asserting retroactive liability on plaintiffs for unpaid premium taxes for the years 1963-1967. Defendant based its assessment on *United National*, contending that from that case it may be extrapolated that the state has the power to tax mail-order insurance companies.

United National was a consolidated action brought by the California Insurance Commissioner against three mail-order insurers asserting the State's right to regulate such insurers. It involved some of the same parties and almost identical facts to the case now at bar. The Supreme Court in *United National* carefully reviewed the situation and determined that the mail-order insurers were in fact "doing business" under the applicable statutes, and therefore were subject to regulation by the state. The same basic areas are pertinent to this court's decision as discussed below.

Interstate Commerce:

The McCarran-Ferguson Act (15 U.S.C., Sections 1011-1015) validates the states' power to regulate and tax insurance companies *without* the automatic violation of the Commerce Clause of the United States Constitution (Article I, Section 8) which could otherwise occur. (See also *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946)). Thus, interstate commerce restrictions are not at issue in the present case.

Fourteenth Amendment:

The Fourteenth Amendment of the U.S. Constitution, however, does present requirements of due process of law which are a separate issue, although the two (i.e., the Commerce clause and Due Process) do often overlap and many decisions have confused them. A series of precedent cases has established that certain minimum contacts are necessary to satisfy the due process of law standards for taxation. Plaintiff herein relies heavily on the fairly recent cases of *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967) and *National Geographic Society v. State Board of Equalization*, 430 U.S. 551 (1977).

National Geographic did deal directly with the question of what constitutes sufficient contacts to establish a taxable nexus, however the court there was dealing with a company which maintained offices in the state, albeit for a different branch of the company than was being taxed. Therefore, the question of *strictly* mail-order business was not addressed directly, and the court only determined that the activity level in the facts before them was enough to sustain the tax.

The court in *National Bellas Hess* refused to sustain a use tax collection duty on a *strictly* mail order firm of retail merchandise. This court finds that a distinction must be drawn between the situation there and the facts now before the court. Retail merchandise sold through mail order catalogues such as was at issue in *National Bellas Hess* is tangible property. Insurance is an intangible and clearly distinguishable on that basis. Imposing a tax, either directly or even as a collection duty, on thousands of different articles sold for varied prices by mail to many

customers is a complex procedure. Taxing insurance premiums paid by mail on only a few types of policies is much simpler and does not impose an undue accounting burden on the insurer whose records would contain the needed information as part of the normal course of business. Therefore, this court finds that the National Bellas Hess decision is not controlling in the case now before it as the types of business involved are significantly different. The sale of an intangible such as insurance is not comparable for purposes of determining tax liability to the sale of taxable retail merchandise articles.

However, the *National Bellas Hess* court did reiterate that the long-standing and determinative due process requirement is "whether the state has given anything for which it can ask return (citations)" (supra at p. 756). A mail order retailer of tangible articles receives little or no direct benefit from the residence states of its customers. A seller of insurance, on the other hand, does receive a benefit from the residence state of its insureds. The insurance business is basically a question of the insurer betting on the health and safety of the people it insures. California clearly then provides many benefits to its citizens which promote their well-being (for example, police and fire protection, highway maintenance and the like). This directly improves the odds on which the plaintiff insurers are gambling with their issuance of insurance policies to those citizens. The state must then be entitled to ask for a return from the insurers who are deriving their income from the safe environment provided by that state to its citizens. Such benefits cannot be provided

without adequate finances. Such financing must, in fairness, come from those benefitting from the services provided by California. The return herein is reasonably demanded in the form of a tax which the defendant has imposed on the plaintiffs.

The 2nd Circuit has recently stated that the police and taxing powers of a state are treated differently for constitutional purposes, and said:

> ". . . extraterritorial impositions of tax collection obligations have been upheld only when it can be said that a benefit has been conferred on the tax collector by virtue of the state's sovereignty, and the tax is related to that benefit (cites omitted)" *Aldens, Inc. v. La Follette,* 552 Fed.2d 745, 749-750 (1977).

This would hold even more true of a direct tax, and defendant state here is providing a taxable benefit.

Plaintiffs maintain, however, that the tax cannot be upheld constitutionally as they do not have sufficient contacts with the state to establish a taxable nexus. They ably argue that there are historically different standards for jurisdiction, regulation and taxation. While not denying the validity of this position, the court finds that plaintiffs' "doing business" within California, as determined by the state's highest court in *People v. United National Life Insurance Company,* 66 Cal.2d 577, 595, 58 Cal.Rptr. 599, *appeal dismissed,* 389 U.S. 330 (1967), is sufficient to sustain taxation as well as regulation. The activity level which the *United National* court considered in reaching its decision

cannot be considered as significant with respect to regulation while de minimus with respect to taxation.* The court therefore finds that there is no violation of plaintiffs' constitutional rights to due process in allowing the defendant state to impose a tax on the business which plaintiffs are doing within California, and that the combined total of plaintiffs' activities is quite sufficient to sustain taxation and not just regulation.

The court's position is reflected in the non-controlling but persuasive 1974 decision of the Wisconsin Supreme Court in *National Liberty Life Ins. Co. v. State*, 62 Wisc. 2d 347, 215 N.W.2d 26 (1974), *cert. denied*, 421 U.S. 946 (1975). The court there referred back to its own prior decision in *Ministers Life & Casualty Union v. Haase*, 30 Wis.2d 339, 141 N.W.2d 287 (1966) that ". . . cases on other types of business are irrelevant to the determination of due process issues in the field of insurance. It then held that apparently in and of itself the large volume of premium dollars collected from Wisconsin citizens by the plaintiff, a Pennsylvania mail order insurance company, established that the company had a taxable nexus in Wisconsin. Here we do not have dollar figures as to the volume of premiums sold by Plaintiffs in California, but the

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*"Thus realistically viewed the insurer through the instrumentality of the mail is for all practical purposes soliciting insurance here as manifestly as if it were to carry on such solicitation through representatives physically present within this state . . .

"In short, these defendants have 'realistically entered the state looking for and obtaining business' (*Ministers Life and Casualty Union* v. *Haase*, 30 Wis.2d 339 (1966); the main aspects of their insurance transactions are in this state; and to say that they are not doing business here is to completely ignore the facts of life and reality.' (cites omitted) We think the substantial interest of California in these transactions is obvious." (supra at p. 593)

figures are given that, for example, National Liberty had 8,642 policies in California in 1963, and 20,323 in 1965, and that I.C.M.A. had 13,926 in 1963 and 10,983 in 1967. This is a significant number of people within the state whose well-being benefits plaintiffs, and in combination with the advertising and other contacts (which are admittedly limited), our holding agrees with that of the Wisconsin court, that there is a sufficient nexus to support the state's taxation.

Apportionment:

As this court sustains defendant's right to tax plaintiffs, then plaintiffs' next contention must be considered. Plaintiffs argue that the tax must be apportioned to more specifically relate to that portion of its activities which are in California than the purely gross premiums tax does.

The tax which defendant has imposed is a single factor, gross premiums tax based solely on the dollar amount of the premiums collected from California residents. Again, there is a long history of precedent requiring that taxes be fairly apportioned as to activities within the taxing jurisdiction in order to be "constitutionally proper" (*General Motors Corporation v. Washington,* (1964) 377 U.S. 436, 440; see also *Equitable Life Society v. Pennsylvania* (1915) 238 U.S. 143).

The most recent decision available is *Moorman Mfg. Co. v. Bair,* 437 U.S. 267, 98 S.Ct. 2340 (1978). The Supreme Court there upheld a single factor formula as violative of neither due process nor the commerce clause, stating ". . . (t)hus we have repeatedly held that a single-factor formula

is presumptively valid. . . . (T)he basic principles that the States have wide latitude in the selection of apportionment formulas and . . . a formula produced assessment will only be disturbed when the taxpayer has proved by clear and cogent evidence that the income attributed to the State is in fact out of all appropriate proportion to the business transacted . . . in that state (citations) or has led to a grossly distorted result (cites omitted).

Here again, because the area involved deals with insurance companies, the Commerce Clause is not an applicable concern, based on the McCarran-Ferguson Act, (15 U.S.C., Sections 1011-1015). The primary question then is whether the tax as presently constituted violates plaintiffs' rights to due process under the Fourteenth Amendment. This court holds that the decision reached in the case of *Moorman Mfg. Co. v. Bair* (supra) is controlling here. Although Moorman did involve the sale of tangibles, the court does not consider that in the context of *apportionment*, the distinction between intangible and tangible is critical, where it is with respect to due process violations for *imposing* the tax initially. There is no significant difference in looking strictly at a seller's gross receipts from a state as to whether those monies were generated by a tangible or intangible product. The court is aware that some of the activities producing the insurance "product" here were done outside of California. However, division of the various components which contribute to an insurance policy is not readily done without considerable speculative types of reasoning, none of which the court finds to be conclusive enough to compel a finding in plaintiffs' favor.

Plaintiffs have not shown to the court's satisfaction that this single factor formula produces an "arbitrary result" such as the court required be shown in *Moorman* (supra). The California tax is a straight percentage of the dollar amount of the premiums paid by California residents. California is in no way taxing the money received by plaintiffs, if any, from other states. It is thus apportioned to the premium monies originating in California only. The tax imposed by defendant remains constant only as to California—it is not affected by whether or not, nor by how much, plaintiffs receive premiums from citizens of other states. The plaintiff insurance companies have not raised any issue as to the actual percentage levied being unreasonable, in relation to that levied by any other states. They only argue against the propriety of the tax and the apportionment, or alleged lack thereof.

The court's determination herein that the gross premiums tax is adequately apportioned has support in the decisions of the Supreme Court as to insurance premiums at least as far back as 1915 in *Equitable Life Society v. Pennsylvania*, 238 U.S. 143. The court there held that the tax imposed on the plaintiff life insurance company was on the benefit to the company by the state in keeping its risks alive, and thus a tax on the privilege of doing business within the state. Thus, the tax did *not* have to be apportioned beyond premiums paid.

The Wisconsin court in *National Liberty Life Ins. Co. v. Wisconsin* concluded and held that the gross premiums determination was not a sufficient apportionment after examining a series of cases dealing with this area. However, that

court did not enlighten us with any understandable reasoning in reaching such conclusion.

This court holds that based on the *Moorman Mfg. Co.* decision, a tax calculated from gross premiums received *from this state only* are inherently apportioned, and are not a seizure without due process.

Retroactivity or Prospective Application.

The tax years in the case at bench are 1963-1967 (inclusive). California's *People v. United National Life Insurance Company,* supra, was decided in 1967. After the decision was handed down (and during the years of 1968 to the commencement of this action) ICMA stopped selling insurance in this state. Liberty continued so selling.

California, prior to the *United National* decision, had administratively held that the gross premiums tax did not apply to the type sales activity in which plaintiffs were engaged. Immediately after the finality of the holding in *United National,* the assessments which are the subject of this action were imposed (i.e., for the prior tax years 1963 through 1967, inclusive). The tax collector cannot be blamed for attempting to slake his thirst by going after as much money as he can from deep corporate insurance pocketbooks.

We must be mindful, however, that in an industry which is based upon actuarial statistics in determining the cost of the sale of its products, all costs of production must be taken into account in determining the ultimate price of the product to the purchaser. In the field of insurance, a gross receipts tax based on premiums would be a "cost of production," economically speaking.

The only authority cited in this action to assist this Court in deciding the issue of retroactive application is *Equitable Life Assurance Society v. Thulemeyer*, 52 P.2d 12 (Wyo., 1935). Though the Wyoming case is not directly in point, that court did consider the issue of retroactivity of taxation assessment in not dissimilar conditions as found in the case at bench. At page 1234, it stated:

> "Here . . . the plaintiff [insurance company] would have made its rates for insurance in question higher, if the payment of the taxes now claimed by the state had been required. It has no recourse against anyone. . . ."

For this (and other) reason(s), Wyoming refused to give retroactive application to tax assessments. This Court adopts the reasoning of the Wyoming Court in this regard that the tax cannot be retroactively applied to petitioners.

Conclusion.

The tax, as assessed, is lawful as pronounced under *People v. United States National*, supra, but cannot be applied as against plaintiffs retroactively. It can be assessed by prospective application to plaintiffs for the years 1968 forward.

Defendants shall prepare findings of fact and conclusions of law (if requested), and a judgment in accord with this memorandum of opinion.

Dated: August 20, 1979.

/s/ Edward L. Cragen
Edward L. Cragen
Judge of the Superior Court

California Superior Court
City and County of San Francisco

Department Number Three

Nos. 608989, 650415
No. 650322

Illinois Commercial Men's Association, a corporation,
Plaintiff,

vs.

The State of California, and the
State Board of Equalization thereof,
Defendants.

National Liberty Life Insurance Company, a corporation,
Plaintiff,

vs.

The State Board of Equalization,
Defendant.

[Filed March 26, 1980]

AMENDMENT TO MEMORANDUM OF OPINION

In its intended decision (Memorandum of Opinion, 8/21/79), this Court determined that the respondent Board of Equalization has the power and authority to impose a gross receipts tax on out-of-state mail order insurance companies upon premiums received from policies sold to residents of the State of California (See Memorandum of Opinion, page 13, August 21, 1979).

In its Memorandum of Opinion, the Court further held that the imposition of such tax should be by prospective application and should not be applied retroactively. The basic underpinning of the Court's determination in this regard was (1) fair play, and (2) something akin to, but not reaching the proportions of, due process.

On petition by respondent, the Court agreed to additional briefing and further argument on the propriety of its determination of the proper application of the imposition of the tax to plaintiffs.

Plaintiffs contend in brief and argument that the tax cannot be applied retroactively because the State, by its own action and inaction, is estopped to collect the tax.

The State relies on *Fidelity & Guaranty Co. v. State Board of Equalization* (1956) 47 Cal.2d 384, which holds that an estoppel will not rise against the government in tax matters where the taxpayer relies on an erroneous construction of the statute by a state official. Further, this is especially true if the taxing agency is the State Board of Equalization and the government official upon whom the taxpayer relied was not an official of the Board of Equalization but of another state agency.

There is no question but that equitable estoppel can be applied against a government agency in a proper case. However, the authorities cited by plaintiffs are distinguished in defendant's brief, pp. 12-17. The distinctions are valid in that the cases cited by plaintiffs are not tax cases or the reliance amounted to a gross injustice—more than is shown here. The *Fidelity & Guaranty* Court specifically rejected "but for the wrong statement of the law by the Insurance Commissioner the premiums would have been

greater" as a ground for equitable estoppel against the State. This trial Court cannot overcome the specific holding by the State Supreme Court on the basis of "fair play" and/or "something akin" to due process of law. Such would amount to the Court usurping the powers of the Legislature.

Judicial restraint and *stare decisis* commands that this Court vacate and set aside that part of its holding denying retroactive application and enter a new and different order in compliance with Government Code Section 12432, allowing assessment of taxes to the period within the statute of limitations.

Though the trial Court might very well disagree with the concept of the holding of *U.S. Fidelity & Guaranty* (supra), little (if any) *detrimental* reliance resulted.

That part of the Court's Intended Decision is hereby vacated and set aside so far as it is inconsistent with the holding herein. The remainder of the Court's Intended Decision is incorporated within this Amended Memorandum of Opinion, and (as such) this decision is final.

Defendant to prepare findings of fact and conclusions of law and a judgment in accord with this Amended Memorandum.

Dated: March 25, 1980.

/s/ Edward L. Cragen
Edward L. Cragen
Judge of the Superior Court

Appendix D

George Deukmejian, Attorney General
of the State of California
Arthur S. de Goede
Assistant Attorney General
Timothy G. Laddish
Deputy Attorney General
6000 State Building
San Francisco, CA 94102
(415) 557-0792
Attorneys for Defendant

Superior Court of the State of California
For the City and County of San Francisco

Nos. 608-989, 650-415

Illinois Commercial Men's Association, a corporation,
Plaintiff,
v.
The State Board of California and the
State Board of Equalization thereof,
Defendants.

[Filed May 21, 1980]

JUDGMENT

This consolidated case came on for trial on January 10, 1979, in Department 3 of the above-entitled court, the Honorable Edward L. Cragen, Judge, presiding. Plaintiff Illinois Commercial Men's Association, a corporation, appeared by its attorneys, Maloney, Chase, Fisher & Hurst, John R. Maloney, Philip Y. Kazan, by Philip Y. Kazan,

and defendants were represented by their counsel, the Attorney General of the State of California, by Timothy G. Laddish, Deputy Attorney General. The above-captioned consolidated action was consolidated for trial with action No. 650-322.

The parties having filed a stipulation of facts in this matter, and no further evidence or testimony having been produced by either party, and the Court having reviewed and considered the stipulation of facts, the briefs and oral arguments of counsel, and the file and papers herein,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff Illinois Commercial Men's Association take nothing, and that defendants recover their costs from plaintiff in the sum of $.....

DATED: 5-21-80

/s/ Edward L. Cragen
Judge of the Superior Court

Appendix E

State of California
State Board of Equalization
120 N Street, Sacramento, California
(P.O. Box 1799, Sacramento, California 90006)

June 14, 1968

Illinois Commercial Men's
Assurance Company
180 North Michigan Avenue
Chicago, Illinois 60601

Gentlemen:

Re: Insurance Premiums Tax Deficiency Assessment

Upon recommendation of the Insurance Commissioner and pursuant to Section 12424 of the Revenue and Taxation Code, the Board made a premiums tax deficiency assessment in the amount of $4,526.10 for business done in 1963 against the company addressed.

The grounds proposed by the Insurance Commissioner for this tax deficiency were set forth in a recent letter sent to you by J. N. Andrews, Assistant Chief, Legal and Compliance Division of the California Department of Insurance. The legal basis for the assessment rests on the case of the People vs. United National Life Insurance Company, et al, 66 Cal 2d 577; 427 P. 2d 199. The appeal to the United States Supreme Court was dismissed December 11, 1967, for want of a substantial federal question, 88 S.Ct. 50; 19 L.ed 2d 563. The State Supreme Court decision held that an insurer providing insurance coverage on California risks through mail solicitation and the like was "doing business"

in California requiring it to have a Certificate of Authority from the Insurance Commissioner and as a consequence premium taxes on the business transacted without a Certificate of Authority must be paid.

Since no tax return had been filed by June 13, 1968, for insurance written during 1963, premiums on California business were estimated at $192,600.00 pursuant to Section 12423 of the Revenue and Taxation Code by applying California's percentage of the Nation's population (9%) to the insurer's total premiums of $2,140,000 as reported in "Best's".

You may protest this action pursuant to Section 12428 of the Revenue and Taxation Code by filing a petition of redetermination with the Board within 30 days of the date of this notification setting forth the grounds of the objection and the correction sought.

If a petition for redetermination is not filed within the 30-day period the deficiency assessment becomes final and is due and payable on or before July 15, 1968. If not paid by that date a penalty of ten percent of the amount of the assessment will also become due.

Remittance for the deficiency assessment including interest at the rate of one-half of one percent per month or fraction thereof of the amount of the tax from the due date of June 15, 1964, to the date of payment should be included and made payable to the State Controller and addressed as follows: State Controller, Division of Tax

Collection and Refund, P. O. Box 1918, Sacramento, California 95809.

Very truly yours,

/s/ JOHN B. MARSHALL
John B. Marshall
Senior Statistician
Research and Statistics

JBM:jm

cc: Insurance Commissioner
State Controller

Appendix F

State of California
State Board of Equalization
1020 N Street, Sacramento, California
(P.O. Box 1799, Sacramento, California 95808)

June 11, 1969

Illinois Commercial Men's Association
180 North Michigan Avenue
Chicago, Illinois 60603

Gentlemen:

Insurance Premiums Tax Deficiency Assessment

Upon recommendation of the Insurance Commissioner and pursuant to Article XIII, Section 14-4/5 of the State Constitution and Part 7 commencing with Section 12001 of Division 2 of the Revenue and Taxation Code, the Board has made a premiums tax deficiency assessment against the company addressed in the amount of $18,698.25 for the years 1964 through 1967. The deficiencies together with interest and penalties are broken down as follows:

Business year	Premiums	Rate	Tax	10% penalty	Interest	Due date
1964	$206,800.00	2.33%	$ 4,818.44	$ 481.34	$1,180.52	6-15-65
1965	204,200.00	2.33	4,757.86	475.79	880.20	6-15-66
1966	202,300.00	2.33	4,713.59	471.36	589.20	6-15-67
1967	189,200.00	2.33	4,408.36	440.84	286.54	6-15-68
	Totals		$18,698.25	$1,869.83	$2,936.46	

The grounds proposed by the Insurance Commissioner for this tax deficiency were set forth in a recent letter sent to you by Mr. J. N. Andrews, Assistant Chief, Compliance and Legal Division of the California Department of Insurance which notified you of your tax liability.

As of this date no tax return has been filed to report your premiums on California business. The assessment, therefore, for each year is based on ten percent of the nationwide premium volume as reported in "Bests Insurance Reports," since California has ten percent of the nation's population.

You may protest this action pursuant to Section 12428 of the Revenue and Taxation Code by filing a petition for redetermination with the Board within 30 days of the date of this notification setting forth the grounds of the objection and the correction sought.

If a petition for redetermination is not filed within the 30-day period the deficiency assessment becomes final and is due and payable on or before July 11, 1969. If a timely petition is not filed or if payment is not made by that date, a penalty of ten percent of the amount of the tax will also become due.

Remittance for the deficiency assessment including interest as shown at the rate of one-half of one percent per month or fraction thereof of the amount of the tax from the due dates indicated, to the date of payment should be included. The interest shown on the first page has been computed through July 15, 1969; if payment is not made by that date, additional interest will accrue at the rate of $93.49 per month or fraction thereof.

Remittance should be made payable to the State Controller and addressed as follows: State Controller, Division of Tax Collection and Refund, P. O. Box 1918, Sacramento, California 95809.

Very truly yours,

/s/ JOHN B. MARSHALL
John B. Marshall
Senior Statistician
Research and Statistics

JBM:jm

cc: Insurance Commissioner
State Controller

Appendix G

State of California
State Board of Equalization
1020 N Street, Sacramento, California
(P.O. Box 1799, Sacramento, California 95808)

June 12, 1972

Mr. John R. Maloney
Maloney, Chase, Fisher & Hurst
465 California Street
San Francisco, California 94104

Dear Mr. Maloney:

Your refund claim filed in behalf of the Illinois Commercial Men's Association for the following amounts was denied by the Board June 9, 1972:

Business year	Amount denied
1964	$ 4,818.44
1965	4,757.86
1966	4,713.59
1967	4,408.36
	$18,698.25

Very truly yours,

/s/ Robert H. Gustafson
Statistical Research and
Consulting Division

RHG:jm
cc: Illinois Commercial Men's Association
Department of Insurance
Mr. J. Norman MacDonald
State Controller's Office
Mr. Elvin L. Funder

Appendix H

Peter W. Fisher
Mark O. Rorem
FISHER & HURST
Four Embarcadero Center
Suite 2500
San Francisco, CA 94111
Telephone: (415) 956-8000
Attorneys for Plaintiff and Appellant
Illinois Commercial Men's Association

In the Supreme Court
of the
State of California

S. F. No. 24557

Illinois Commercial Men's Association,
Plaintiff and Appellant,

vs.

State Board of Equalization,
Defendant and Respondent.

National Liberty Life Insurance Company,
Plaintiff and Appellant,

vs.

State Board of Equalization,
Defendant and Respondent.

[Filed Jan 19, 1984]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Illinois Commercial Men's Association, one of the Plaintiffs and Appellants above-named, hereby appeals to the Supreme Court of the United States from the entire final judgment of the Supreme Court of the State of California entered against said Plaintiff/Appellant in this action on October 31, 1983, affirming the judgment of the Superior Court of the State of California, in and for the City and County of San Francisco.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: January 18, 1984.

Peter W. Fisher
Mark O. Rorem
FISHER & HURST

By MARK O. ROREM
Mark O. Rorem
Counsel for Plaintiff and Appellant

PROOF OF SERVICE BY MAIL

Natalie Domansky hereby declares;

I am employed with the law firm of FISHER & HURST, whose address is Four Embarcadero Center, Suite 2500, San Francisco, California 94111; and that I am not a party to the cause, and that I am over the age of eighteen years.

That on the date hereof, pursuant to U.S. Supreme Court Rule 28.5(c), I served a copy of

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

on the following by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

John Van de Kamp,
Attorney General
Timothy G. Laddish,
Deputy Attorney General
Office of the Attorney General
State of California
6000 State Building
San Francisco, CA 94102

Prentiss Willson, Jr.
MORRISON & FOERSTER
One Market Plaza
Spear Street Tower
San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

EXECUTED at San Francisco, California, this 18th day of January, 1984.

Natalie Donmansky
(typed)

NATALIE DOMANSKY
(signature)

Appendix I

PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES

Fourteenth Amendment

. . . nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF CALIFORNIA

ARTICLE XIII

SECTION 14-4/5. Taxation of Insurance Companies.

(a) "Insurer", as used in this section, includes insurance companies or associations and reciprocal or interinsurance exchanges and the State Compensation Insurance Fund. As used in this paragraph, "companies" includes persons, partnerships, joint stock associations, companies and corporations.

(b) An annual tax is hereby imposed on each insurer doing business in this State on the base, at the rates, and subject to the deductions from the tax hereinafter specified.

(c) In the case of an insurer not transacting title insurance in this State, the "basis of the annual tax" is, in respect to each year, the amount of gross premiums, less return premiums, received in such year by such insurer upon its business done in this State, other than premiums received for reinsurance and for ocean marine insurance.

In the case of an insurer transacting title insurance in this State, the "basis of the annual tax" is, in respect to

each year, all income upon business done in this State, except:

(1) Interest and dividends.

(2) Rents from real property.

(3) Profits from the sale or other disposition of investments.

(4) Income from investments.

"Investments" as used in this subdivision (d) includes property acquired by such insurer in the settlement or adjustment of claims against it but excludes investments in title plants and title records. Income derived directly or indirectly from the use of title plants and title records is included in the basis of the annual tax.

In the case of an insurer transacting title insurance in this State which has a trust department and does a trust business under the banking laws of this State, there shall be excluded from the basis of the annual tax imposed by this section, the income of, and from the assets of, such trust department and such trust business, if such income is taxed by this State or included in the measure of any tax imposed by this State.

(d) The rate of the tax to be applied to the basis of the annual tax in respect to each year is 2.35 percent.

(e) Each insurer shall have the right to deduct from the annual tax imposed by this section upon such insurer in respect to a particular year the amount of real estate taxes paid by it, in that year, before, or within 30 days after, becoming delinquent, on real property owned by it at the time of payment, and in which was located, in that year, its home office or principal office in this State. Such real

property may consist of one building or of two or more adjacent buildings in which such an office is located, the land on which they stand, and so much of the adjacent land as may be required for the convenient use and occupation thereof.

Where as a result of merger, consolidation, or other method of acquisition of substantially all of the assets of one or more insurers by another insurer, effected prior to January 1, 1939, an insurer owns more than one parcel of real property in this State in which was located a home office or principal office of an insurer immediately prior to such acquisition, the owner shall designate one of such properties as its home or principal office. Real estate taxes paid by it in any of the years 1943 to 1952, inclusive, before, or within 30 days after, becoming delinquent, on such property owned by it at the time of payment and not so designated may also be deducted from the annual tax imposed by this section in respect to such year and are included within the deduction provided for in this subdivision.

(f) The tax imposed on insurers by this section is in lieu of all other taxes and licenses, state, county, and municipal, upon such insurers and their property, except:

(1) Taxes upon their real estate.

(2) That an insurer transacting title insurance in this State which has a trust department or does a trust business under the banking laws of this State is subject to taxation with respect to such trust department or trust business to the same extent and in the same manner as trust companies and the trust departments of banks doing business in this State.

(3) When by the laws of any other state or country any taxes, fines, penalties, licenses, fees, deposits of money or securities or other obligations or prohibitions are imposed on insurers of this State doing business in such other state or country, or upon their agents therein, in excess of those imposed upon insurers of such other state or country or upon their agents therein, so long as such laws continue in force, the same obligations and prohibitions of whatsoever kind may be imposed by the Legislature upon insurers of such other state or country doing business in this State, or upon their agents herein.

(4) The tax on ocean marine insurance.

(5) Motor vehicle and other vehicle registration license fees and any other tax or license fee imposed by the State upon vehicles, motor vehicles or the operation thereof.

(g) Every insurer transacting the business of ocean marine insurance in this State shall annually pay to the State a tax measured by that proportion of the underwriting profit of such insurer from such insurance written in the United States, which the gross premiums of the insurer from such insurance written in this State bear to the gross premiums of the insurer from such insurance written within the United States, at the rate of 5 percentum, which tax shall be in lieu of all other taxes and licenses, state, county and municipal, upon such insurer, except taxes upon real estate, and such other taxes as may be assessed or levied against such insurer on account of any other class of insurance written by it. Deductions from the annual tax pursuant to subdivision (e) cannot be made

from the ocean marine tax. The Legislature shall define the terms "ocean marine insurance" and "underwriting profit," and shall provide for the assessment, levy, collection and enforcement of the ocean marine tax.

(h) The taxes provided for by this section shall be assessed by the State Board of Equalization.

(i) The Legislature, two-thirds of all the members elected to each of the two houses voting in favor thereof, may by law change the rate or rates of taxes herein imposed upon insurers.

(j) This section is not intended to and does not change the law as it has previously existed with respect to the meaning of the words "gross premiums, less return premiums, received" as used in this section or as used in Section 14 or 14¾ of this article.

CONSTITUTION OF THE STATE OF CALIFORNIA
ARTICLE XIII

SECTION 28. Taxation of Insurance Companies

(a) Insurer

Sec. 28. (a) "Insurer," as used in this section, includes insurance companies or associations and reciprocal of interinsurance exchanges together with their corporate or other attorneys in fact considered as a single unit, and the State Compensation Insurance Fund. As used in this paragraph, "companies" includes persons, partnerships, joint stock association, companies and corporations.

(b) Annual tax

(b) An annual tax is hereby imposed on each insurer doing business in this state on the base, at the rates, and subject to the deductions from the tax hereinafter specified.

(c) Basis

(c) In the case of an insurer not transacting title insurance in this state, the "basis of the annual tax" is, in respect to each year, the amount of gross premiums, less return premiums, received in such year by such insurer upon its business done in this state, other than premiums received for reinsurance and for ocean marine insurance.

In the case of an insurer transacting title insurance in this state, the "basis of the annual tax" is, in respect to each year, all income upon business done in this state, except:

(1) Interest and dividends.

(2) Rents from real property.

(3) Profits from the sale or other disposition of investments.

(4) Income from investments.

Investments

"Investments" as used in this subdivision includes property acquired by such insurer in the settlement or adjustment of claims against it but excludes investments in title plants and title records. Income derived directly or indirectly from the use of title plants and title records is included in the basis of the annual tax.

In the case of an insurer transacting title insurance in this state which has a trust department and does a trust

business under the banking laws of this state, there shall be excluded from the basis of the annual tax imposed by this section, the income of, and from the assets of, such trust department and such trust business, if such income is taxed by this state or included in the measure of any tax imposed by this state.

(d) Tax rate

(d) The tax rate of the tax to be applied to the basis of the annual tax in respect to each year is 2.35 percent.

(e) Deductions

(e) Repealed.

(f) Other taxes and licenses

(f) The tax imposed on insurers by this section is in lieu of all other taxes and licenses, state, county, and municipal, upon such insurers and their property, except:

(1) Taxes upon their real estate.

(2) That an insurer transacting title insurance in this state which has a trust department or does a trust business under the banking laws of this state is subject to taxation with respect to such trust department or trust business to the same extent and in the same manner as trust companies and the trust departments of banks doing business in this state.

(3) When by or pursuant to the laws of any other state or foreign country any taxes, licenses and other fees, in the aggregate, and any fines, penalties, deposit requirements or other material obligations, prohibitions or restrictions are or would be imposed upon California insurers, or upon the agents or representatives of such insurers, which are in excess of such

taxes, licenses and other fees, in the aggregate, or which are in excess of the fines, penalties, deposit requirements or other obligations, prohibitions, or restrictions directly imposed upon similar insurers, or upon the agents or representatives of such insurers, of such other state or country under the statutes of this state; so long as such laws of such other state or country continue in force or are so applied, the same taxes, licenses and other fees, in the aggregate, or fines, penalties or deposit requirements or other material obligations, prohibitions, or restrictions, of whatever kind shall be imposed upon the insurers, or upon the agents or representatives of such insurers, of such other state or country doing business or seeking to do business in California. Any tax, license or other fee or other obligation imposed by any city, county, or other political subdivision or agency of such other state or country on California insurers or their agents or representatives shall be deemed to be imposed by such state or country within the meaning of this paragraph (3) of subdivision (f).

The provisions of this paragraph (3) of subdivision (f) shall not apply as to personal income taxes, nor as to ad valorem taxes on real or personal property nor as to special purpose obligations or assessments heretofore imposed by another state or foreign country in connection with particular kinds of insurance, other than property insurance; except that deductions, from premium taxes or other taxes otherwise payable, allowed on account of real estate or personal property taxes paid shall be taken into consideration

in determining the propriety and extent of retaliatory action under this paragraph (3) of subdivision (f).

For the purposes of this paragraph (3) of subdivision (f) the domicile of an alien insurer, other than insurers formed under the laws of Canada, shall be that state in which is located its principal place of business in the United States.

In the case of an insurer formed under the laws of Canada or a province thereof, its domicile shall be deemed to be that province in which its head office is situated.

The provisions of this paragraph (3) of subdivision (f) shall also be applicable to reciprocals or interinsurance exchanges and fraternal benefit societies.

(4) The tax on ocean marine insurance.

(5) Motor vehicle and other vehicle registration license fees and any other tax or license fee imposed by the state upon vehicles, motor vehicles or the operation thereof.

(6) That each corporate or other attorney in fact of a reciprocal or interinsurance exchange shall be subject to all taxes imposed upon corporations or others doing business in the state, other than taxes on income derived from its principal business as attorney in fact.

A corporate or other attorney in fact of each exchange shall annually compute the amount of tax that would be payable by it under prevailing law except for the provisions of this section, and any management fee due from each exchange to its corporate or other

attorney in fact shall be reduced pro tanto by a sum equivalent to the amount so computed.

(g) Tax on underwriting profits from ocean marine insurance

(g) Every insurer transacting the business of ocean marine insurance in this state shall annually pay to the state a tax measured by that proportion of the underwriting profit of such insurer from such insurance written in the United States, which the gross premiums of the insurer from such insurance written in this state bear to the gross premiums of the insurer from such insurance written within the United States, at the rate of 5 per centum, which tax shall be in lieu of all other taxes and licenses, state, county and municipal, upon such insurer, except taxes upon real estate, and such other taxes as may be assessed or levied against such insurer on account of any other class of insurance written by it. The Legislature shall define the terms "ocean marine insurance" and "underwriting profit," and shall provide for the assessment, levy, collection and enforcement of the ocean marine tax.

(h) Assessment

(h) The taxes provided for by this section shall be assessed by the State Board of Equalization.

(i) Rate changes

(i) The Legislature, a majority of all the members elected to each of the two houses voting in favor thereof, may by law change the rate or rates of taxes herein imposed upon insurers.

(j) Gross premiums, less return premiums, received

(j) This section is not intended to and does not change

the law as it has previously existed with respect to the meaning of the words "gross premiums, less return premiums, received" as used in this article.

CALIFORNIA REVENUE AND TAXATION CODE

SECTION 12201. Levy; base; rates; deductions

Every insurer doing business in this State shall annually pay to the State a tax on the basis, at the rates, and subject to the deductions from the tax hereinafter specified. For purposes of the tax imposed by this chapter, "insurer" shall be deemed to include a home protection company as defined in Section 12740 of the Insurance Code.

SECTION 12202. Rate of tax

The rate of tax to be applied to the basis of the annual tax in respect to each year is 2.35 percent except the rate to be applied to the basis in respect to the years 1982, 1983, 1984, and 1985 is 2.33 percent and except that as to gross premiums received upon policies or contracts issued in connection with a pension plan or profit-sharing plan exempt or qualified under Section 401(a), 403(b), 404, 408(b), or 501(a) of the United States Internal Revenue Code as they may be amended or renumbered from time to time, the rate of tax shall be the percentage set forth below opposite each year:

Year	Percentage
1960	2.15
1961	1.95
1962	1.75
1963	1.55
1964	1.35
1965 through 1968	1.00
1969 and each year thereafter	0.50

SECTION 12978. Limitation on claim for credit or refund

No credit or refund shall be allowed or approved after four years after April 1st of the year following the year for which the overpayment was made, or with respect to a deficiency assessment made under Article 3 of Chapter 4 of this part after six months from the date the deficiency assessment becomes final, or after six months from the date of the overpayment, whichever period expires the later, unless claim therefor is filed with the commissioner or the board within such period.

SECTION 12979. Form and contents of claim

Every claim for refund or credit shall be in writing and shall state the specific grounds upon which it is founded.